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CASES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1918.

THE UNITED STATES, APPELLANT,
v.
THE PURCELL ENVELOPE COMPANY, appellee.
No. 168.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an appeal from a judgment for appellee in the sum of $185,331.76, in which three judges concur and Chief Justice Campbell dissents.

Appellee, the Purcell Envelope Company, is a corporation, organized under the laws of the State of New York on July 3, 1894, having its principal office at Albany, New York.

On March 30, 1898, in response to an advertisement by the Postmaster General inviting bids, appellee submitted its proposal to furnish the Government with stamped envelopes and newspaper

wrappers for a period of four years beginning the 1st day of October, 1898. The specifications (Rec. 18), which were a part of the advertisement, provided that

> If the bidder to whom the first award may be made should fail to enter into a contract as herein provided, then the award may be annulled, and the contract let to the next lowest responsible bidder, and so on until the required contract is *executed;* and such next accepted bidder shall be required to fulfill every stipulation embraced herein as if he were the original party to whom the contract was awarded.
>
> *The contract will be executed in quadruplicate.* [Italics ours.]

The specifications also stated under the subject "Basis and Manner of Award" (Rec. 16) that "The contract will be awarded on the basis of the issues, in round numbers, of corresponding sizes and qualities, for the year ending December 31, 1897, as follows." Fourteen sizes and qualities were enumerated with the number set opposite each size and quality, and totaling 600,658,000 for the year. The specifications further require appellee (Rec. 17) "to furnish at the prices bid all the envelopes and wrappers that may be ordered by the Department during the contract term * * * subject to the provision as to those on hand at the termination of the present contract." Appellee was to satisfy the Postmaster General upon ten days' notice of his ability to perform the contract, and upon his failure to do so the

Postmaster General could, "in his discretion decline to accept the bid, and without notice." (Rec. 17.) Appellee was to accompany his proposal with a bond which, as in this case, was to be furnished by a guarantee company of whose responsibility the Postmaster General must be satisfied and if at any time he became dissatisfied the Postmaster General could, within ten days after notice, call for additional security, and in the event of the same not being produced could annul the contract. (Rec. 17, 18.)

Appellee submitted its proposal (Finding III, Rec. 46) "to enter into contract according to the terms, conditions, and requirements of the advertisement and specifications aforesaid." Before the award was made on April 20, 1898, Postmaster General Gary, through one of his officers, investigated the "business and financial standing of the claimant," and the report thereunder was favorable to said claimant. (Rec. 49.) Upon notifying appellee of the award made by the Postmaster General to appellee (Finding V, Rec. 50), the Third Assistant Postmaster General said in his letter of April 20:

> As soon as it can be prepared, a form of contract will be sent to you for formal execution.

Such contract was sent on April 21, 1898, in quadruplicate (Finding VI, Rec. 50), and on the same day a letter was transmitted to appellee requesting new and distinctive designs of embossed stamps on all the envelopes. (Finding VII, Rec. 51.) The form of contract was returned to the Third Assistant

Postmaster General on April 22, 1898, signed by the Purcell Envelope Company by the president, James Purcell, and its surety, The Fidelity & Deposit Company of Maryland, by its vice president. The contract was not signed by the Postmaster General or any officer on behalf of the United States (Finding VIII, Rec. 51), neither was the surety approved. Five days after its return appellee was notified by letter that the Postmaster General had not yet signed the contract and was holding the matter in abeyance, and appellee was requested to suspend all action under letter of the 21st instant, until further orders. (Finding IX, Rec. 52.)

On April 21, 1898, Charles Emory Smith became Postmaster General (Rec. 60), and instituted an investigation (Rec. 54) into the business and financial standing of appellee, and the report was unfavorable.

On July 22, 1898, the Postmaster General, not having signed the contract nor approved the bond, recalled and annulled the award to appellee (Finding XIV, Rec. 53). On July 26, 1898, the Postmaster General, acting under the powers granted to him by section 3709 R. S., gave an emergency order to the Plimpton Manufacturing Company of Hartford, Conn., and on October 25, 1898, entered into a contract with the said company for stamped envelopes and newspaper wrappers for the four years beginning January 1, 1899. (Rec. 54–58, Findings XVI and XVII.) No wrappers or envelopes were ever ordered by the Government from appellee.

Subsequently appellee instituted this action in the Court of Claims and the court rendered judgment in its favor in the sum of $185,331.76, being the difference between what it declared was the cost of materials and manufacture of said envelopes and newspaper wrappers, to wit, $2,275,224.46, and what it termed "claimant's contract price of $2,460,556.22." (Finding XX, Rec. 59.)

The Government maintains that there could have been no contract unless the same was in writing and signed by the Postmaster General or a properly authorized officer; that no such written contract having been entered into, appellee is foreclosed from bringing suit on contract for anticipated profits; that admitting for the purposes of this statement only that there was a contract, then attention is called to the fact that the Government presented evidence which has been brought to this court's attention by a motion to remand on the ground that the lower court refused to find ultimate facts therefrom, although requested so to do (Rec. 67); that if the Government was correct in its position in said motion, and such ultimate facts had been incorporated in the findings, it would have appeared that Postmaster General Gary was misinformed of appellee's ability to perform his prospective contract, and that the information acquired by the investigation of Postmaster General Smith would have shown that appellee was in such a position financially and otherwise as to raise a serious doubt in the mind of Postmaster General Smith as to appellee's ability to perform

such contract; that having discretion, under the terms of the contract, he annulled the award, and in so doing foreclosed appellee's right to any judgment; that, admitting for the purposes of this statement only that there was a contract, nevertheless the court should have found what the cost of acquiring the Wickham envelope machines (Finding IX, Rec. 53) was to appellee and should have reduced the judgment by said amount; that admitting for the purpose of this statement only that appellee was entitled to judgment, the same should have been based upon the issues in round numbers of corresponding sizes and qualities (Rec. 16) for the year ending December 31, 1897, being four times 600,658,000 for a four-year period, to wit, 2,402,632,000, and not based upon all of the envelopes manufactured by the Plimpton Company under the emergency order and its contract for a four-year period, being, to wit, 3,050,237,250; that, admitting for the purposes of this statement only, there was a contract, then the court should have rendered judgment for a less sum than entered, due to the elimination of the hazard accruing to appellee if it had performed the contract, as revealed by the said contract. (Rec. 27, 28.)

Appellee's position is that when the award was made by the Government to it a contract was consummated and the signature of the Postmaster General to the contract itself was not required; that the Government breached the same by failure to

order any envelopes during the four-year period and subjected itself to a judgment for the difference between the alleged cost of said envelopes and wrappers and the contract prices which Plimpton & Company received for all the envelopes manufactured by said company for the Government under an emergency order of July 22, 1898 (Finding XVI, Rec. 54), and its four-year contract beginning January 1, 1899 (Finding XVII, Rec. 56).

The court's attention is respectfully called to the fact that on January 13, 1919, appellant's motion to remand this cause to the Court of Claims for additional findings was denied without foreclosing the power of the court to make such order hereafter on its own motion if so advised. The matters presented under headings First, Second, Third, and Fourth of this brief relate to certain matters covered by the motion, which, it is submitted, should be considered on the merits.

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ASSIGNMENTS OF ERROR.

I.

The court erred in rendering judgment for appellee and against appellant.

II.

The court erred in refusing to dismiss the petition.

III.

The court erred in finding as a conclusion of law upon the findings of fact that appellee was entitled to a judgment against appellant in the sum of $185,331.76.

IV.

The court erred in failing to make findings of fact upon questions of fact requested by appellant and as set forth in the record (67–76).

ARGUMENT.

FIRST.

The contract on its face required the signature of the Postmaster General and without such signature was not binding upon the Government.

The Government maintains that the steps taken leading up to the drafting of the contract, and the language of that document on its face required the signature of the Postmaster General in order to bind the Government.

On March 30, 1898 (Finding III, Rec. 46), appellee submitted its proposal which stated that:

> In the event of the acceptance of the foregoing bid, the said *The Purcell Envelope Co.*

> *agrees, within ten days from the date of such acceptance, to enter into contract* according to the terms, conditions, and requirements of the advertisement and specifications aforesaid; in which contract the contractor and its sureties shall covenant and agree that in case the said contractor shall fail to do or perform all or any of the covenants, stipulations, and agreements of said contract on the part of the said contractor to be performed, as therein set forth, the said contractor and its sureties shall forfeit and pay to the United States of America the sum of two hundred thousand dollars, for which said forfeiture the said contractor and its sureties shall be jointly and severally liable as fixed and settled damages, and not as a penalty to be reduced or diminished, to be sued in the name of the United States. [Italics ours.]

On April 20, 1898 (Finding V, Rec. 50), Third Assistant Postmaster General Merritt wrote Mr. James Purcell, president of the company, notifying him of an order awarding the contract to his company and saying, "As soon as it can be prepared, a form of contract will be sent to you for formal execution."

On April 21, 1898 (Finding VI, Rec. 50), Mr. Merritt again wrote Purcell saying that he was sending the "contract in quadruplicate, to be entered into" and asking him to sign it at once. On the same day (Finding VII, Rec. 51), and obviously before the contract had been signed by Purcell, he wrote a third letter to Mr. Purcell asking for some new and

distinctive designs of embossed stamps on all the envelopes, indicating thereby that the contract was not closed at that time.

The contract itself (Rec. 7) shows that it was to be "executed in quadruplicate, between the United States of America, acting by the Postmaster General of the first part, and the Purcell Envelope Company * * * of the second part." This document concludes (Rec. 29) with a declaration that the "said Postmaster General has caused the seal of the Post Office Department of the United States of America to be hereunto affixed, and has attested the same by his signature," and provides a blank space for the Postmaster General to sign and for the attest by the Third Assistant Postmaster General.

In response to appellee's contention that the making of the award bound the Government the same as if a contract had been signed, it should be noted that from pages 20 to 29, inclusive, of the record there are set forth eleven paragraphs defining the duties of the contractor and eighteen paragraphs defining the duties of the Government, none of which was in the specifications upon which the bid was made and hence could not have been considered at the time of the award.

The manner of executing the contract, as just referred to, is in accord with the act of Congress approved March 3, 1877 (19 Stat. 319, 335), of which section 4 is as follows:

> SEC. 4. That the Third Assistant Postmaster General, when directed by the Postmaster

> General, may also sign, in his name, in the place and stead of the Postmaster General, and attest his signature by the seal of the Post Office Department, all contracts for supplies of postage stamps, *stamped envelopes, newspaper wrappers*, postal cards, registered package envelopes, locks, seals, and official envelopes for the use of postmasters, and return of dead letters, that may be required for the Postal Service. [Italics ours.]

Whether the Postmaster General delegated his authority to execute the contract is not necessary to determine. It is obvious, however, that whether the contract was to be executed by him or an assistant, the manner of doing so was prescribed by the language of the contract and by statute. From this correspondence leading up to the execution of the contract, the inference is unavoidable that both parties thereto had notice and understood that the contract would not be binding until both parties signed it.

The principle is illustrated in the case of *Steamship Co.* v. *Swift*, 86 Me. 248, and cases therein cited. Plaintiff brought an action for approximately $25,000 as damages for breach of a contract which had been "carefully drawn up." The court said (p. 261) that the same "was at the most only the acceptance of the proposed basis of a contract." Discussing the contract the court said (p. 259):

> That in determining which view (whether there was or was not a binding contract) is entertained in any particular case, several circumstances may be helpful, as: Whether

> the contract is of that class which are usually found to be in writing; whether it is of such nature as to need a formal writing for its full expression; whether it has few or many details; whether the amount involved is large or small; whether it is a common or unusual contract; whether the negotiations themselves indicate that a written draft is contemplated as a final conclusion of the negotiations. If a written draft is proposed, suggested, or referred to during the negotiations, it is some evidence that the parties intended it to be the final closing of the contract.

In the foregoing case the defendant denied the existence of a contract, and the court held, "there is no contract until the written draft is finally signed." The instant case embodies all the circumstances enumerated in the case cited, and for that reason reinforces the conclusion that in law a contract was not made in the case at bar.

In the case of *Ambler* v. *Whipple*, 20 Wall. 546, 556, the question arose over the dissolution of a copartnership. For this purpose an instrument was prepared. It was signed by Whipple, who asserted that plaintiff had promised to sign it, and hence it was binding on both of them. The document showed upon its face that it required the signature of both parties. Answering claimant, the court said:

> Admitting all this to be true, it is very clear that both parties intended to have a written instrument signed by each as the evidence of

> any contract they might make on that subject, and neither considered any contract concluded until it was fully executed.

In the case of *Commercial Telegram Co.* v. *Smith*, 47 Hun. (New York) 494, an agreement was apparently made by correspondence. The minds of the parties met upon the subject, which related to the placing of reporters upon the floor of the stock exchange. The proposal of one of the parties was accepted by the other, who stated that they were ready to execute an agreement whenever submitted. The court said:

> There is, of course, no question but that a contract may be entered into by letter as well as any other way, as long as the parties understand that the one is making a proposition the acceptance of which shall make a contract binding upon both parties. If, however, from the nature of the correspondence it appears that such correspondence is intended to be only the settlement of the preliminaries of a more formal contract, *and that it is the intention of the parties that these preliminaries shall be reduced to the form of a more formal agreement, to be executed by the parties, then the proffer of these preliminaries on the one part and the acceptance of them on the other by no means constitute a contract because it is the intention of the parties that something else shall be done before the proposed agreement shall become binding* (501–502). [Italics ours.]

In the foregoing case the plaintiff had "made large expenditures," but the court said that the fact that

it had acted in this manner afforded no ground to find the existence of a contract (503).

Applying the reasoning laid down in these cases to a situation where an executive officer of the Government, acting for the public interest and under laws requiring preliminary negotiation with formalities to be entered into before the final execution of a contract, a much stronger emphasis may be laid upon the proposition that the contract herein could not be considered binding until signed by the Postmaster General or his assistant.

Appellee was presumed to be conversant, through past experience, with the method required by the Government in the execution of the contract. His contract of 1894 (Finding I, Rec. 44) for the manufacture of envelopes, was signed and executed by the parties in the form and manner as required in the signing of the instant contract. In fact, all contracts of a similar character for envelopes and wrappers had been signed by the Postmaster General since 1882. (Reports P. M. G. 1882, pp. 335–336; id. 1886, pp. 754–768; id. 1890, pp. 933–949; id. 1894, pp. 522–535; id. 1898, pp. 802–814.)

The contract called for (Rec. 17) the approval of the standing of the guarantee company that was to act as surety, and of the bond that was to be given. Appellee supplied a bond executed by the Fidelity & Deposit Company of Maryland for the amount required by the statute and returned the same with the contract to the Postmaster General on April 22, 1898. The latter did not approve of either the

surety or the bond. Postmaster General Gary had been succeeded by Charles Emory Smith on April the 21st. The contract had gone forth from the post office under Mr. Gary's régime. However, as early as the 27th, five days after the receipt of the contract from appellee, Postmaster General Smith notified appellee (Rec. 52) that he had not signed the contract, and requested suspension of all action until further orders. It is argued by appellee, and its contention is supported by the opinion (Rec. 52), that silence on the part of the Postmaster General during this period of five days from the time the contract was mailed to him was equivalent to approval of the surety and of the bond. Such a presumption, however, can not be indulged in against even a private party from the standpoint of time, and surely not against an official who is charged with the multifarious public duties devolving upon the Postmaster General. Such a presumption would also be worthless as against the Postmaster General, since the formal language of the contract called for his approval of the surety and the bond. He had a right to express this approval in the manner which the contract prescribed, and this was by his signature to the contract, duly attested and returned to appellee. The approval of the surety and the bond was a condition precedent of which appellant had the right to avail itself, and before appellee could recover under any circumstances it must have been shown that appellant approved in both instances. The record fails to

show any approval, and it does not disclose a waiver thereof. Approval of the bond was not only required by the terms of the contract, but by statute, for the act of Congress of August 13, 1894 (28 Stat. 279), entitled "An act relative to Recognizances, Stipulations, Bonds, and Undertakings, and to allow certain corporations to be accepted as surety thereon," recites as follows:

> Provided, That such recognizance, stipulation, bond, or undertaking *be approved by the head of department*, court, judge, officer, board, or body executive, legislative, or judicial required to approve or accept the same. [Italics ours.]

Since appellee can not show a contract signed by the Postmaster General and properly attested, and has failed to prove that he accepted the bond or the surety, and the award was revoked and canceled by the Postmaster General (Rec. 53, Finding XIV), appellee is foreclosed from any claim for anticipated profits.

> *Monroe* v. *United States*, 184 U. S. 524, 529.
> *National Bank* v. *Hall*, 101 U. S. 43, 50.
> *Bank* v. *Dandridge*, 12 Wheat. 64.

It is asserted that the acceptance of appellee's bid and the award constituted a contract. Appellee relies upon an intermediate transaction in support of an alleged express contract and quotes much from the Garfielde case (93 U. S. 242), but ignores a vital distinction between that case and the one at bar. In the Garfielde case there was a proposal submitted

to carry mail; it was accepted and thereafter "suspended," and a contract entered into with another person to carry mail. The court said:

> The proposal * * * and the acceptance * * * created a contract of the same force and effect as if a formal contract had been written out and signed by the parties * * *. We believe it to be sound *and that it should be so held in the present case.* [Italics ours.]

The court did not say, or assume to say, that the acceptance of a proposal in *all* cases constituted a contract, but held that it did "in the present case" (Garfielde). There was a reason for the conclusion in the Garfielde case which does not obtain in the case at bar. Congress made a contract for the Postmaster General in the cited case. The statute under which it was awarded so provided. The award was made under and in pursuance of section 3949, R. S., which provides:

> All contracts for carrying the mails * * * shall be awarded to the lowest bidder tendering sufficient guarantees for faithful performance.

Section 3945, R. S., provided for the guarantees, what they should contain, and how signed.

Section 3946, R. S., provided for the nature of the proof, showing that the bidder had the pecuniary ability to fulfill his obligations, along with certain other requirements.

Section 3954 provided that any person receiving the award of such a contract who refused or failed

to enter into it, wrongfully, should be guilty of a misdemeanor.

Garfielde produced the requisite guaranties; he was the lowest bidder. Congress directed the Postmaster General to award the contract to the lowest bidder presenting these guarantees. In other words, in awarding the mail contract to Garfielde, the Postmaster General was performing a ministerial duty only. He had simply to ascertain who was the lowest bidder, and whether or not such bid was accompanied by the guarantees specified in the statute. These facts determined to whom the contract must be awarded, and with whom it must be made. The Postmaster General did not do what Congress directed him to do. Hence Garfielde recovered for a sum equal to one month's compensation under the proposal made by him and accepted by the Postmaster General, which was the amount provided by the regulations of department. The instant case does not involve such a principle, as will later appear in this brief.

SECOND.

Postmaster General Smith had the discretionary power to vacate the award made by his predecessor, since the contract was not consummated and he was acting in a quasi-judicial capacity.

Appellee challenges the right of Postmaster General Smith to vacate the award which had been granted by Postmaster General Gary, alleging in the petition (Rec. 5) that Postmaster General Smith refused to

keep and perform the contract "without any just, legal or reasonable cause whatsoever." The court has found (Finding IV, Rec. 49) that:

> Before issuing the foregoing order Postmaster General Gary instituted an investigation through one of his proper officers into the business and financial standing of the claimant, and the report thereunder was favorable to said claimant.

It will be recalled that immediately after the sending of the contract form to appellee Postmaster General Gary resigned and Charles Emory Smith, who succeeded him, instituted an investigation of the matters surrounding the award in question, and on July 22 (Finding XIV, Rec. 53) he issued an order revoking and cancelling the same.

The court has found (Finding XIV, Rec. 54):

> Before issuing the foregoing order Postmaster General Smith instituted an investigation through one of his proper officers into the business and financial standing of the claimant, and the report thereunder was unfavorable to the said claimant.

There was no limitation upon the Postmaster General in the making of such a contract other than that he should approve of the bond and bondsmen; should execute the contract, have it properly attested, and make the same for a period not exceeding four years. Otherwise he was a free agent, acting for the Government, with full discretionary powers in the making of the contract. Notwithstanding that Post-

master General Gary had approved of the business and financial standing of appellee, the Government's position is that the awarding of a contract in this instance was the exercise of a judicial function, it being not mandatory upon the Postmaster General to accept appellee's bid, and his action being judicial rather than ministerial, he had the right to review a predecessor's decision, if in his opinion it was founded upon mistake.

In the case of the *United States* v. *Bank of the Metropolis*, 15 Pet. 377, 401, the court recognized a principle which the Government sought to have the Court of Claims consider in the present case when it said:

> This right in an incumbent (head of a governmental department) of reviewing a predecessor's decision, extends to mistakes in matters of fact arising from errors in calculation, and to cases of rejected claims, in which material testimony is afterwards discovered and produced.

In view of the foregoing doctrine, unless Postmaster General Smith acted in a manner so capricious as to imply bad faith, which is not to be presumed since the court did not so find, he had the authority to annul the award in the light of the information brought to him relating to appellee's lack of ability to perform the contract. It was this conception of the situation that the Government endeavored to present to the court in its request for findings which the court overruled, as set

forth in the record (pp. 67–76). The purpose of Findings I–X, inclusive, and XIX was to draw from the court ultimate findings on five propositions based on the evidence in the case:

(*a*) What the representations (proposed Findings I and II) were that had been made to Postmaster General Gary concerning the financial responsibility of the company, its officers and stockholders, and the company's capacity and equipment for performing the contract;

(*b*) What evidence (proposed Findings III–IX, inclusive) Postmaster General Smith developed from his investigation showing that the information presented to Postmaster General Gary was misleading, deceiving and wholly wrong;

(*c*) What facts (proposed Findings VII, VIII, and IX) had been brought to the attention of the Postmaster General soon after the award by a competitive bidder who asserted that the award should have been made to him and that the award to appellee was not just or legal, the purpose of the Government being to show that Postmaster General Smith was put upon notice of these facts, and as a public official, should have acted;

(*d*) Whether (proposed Finding XIX) Postmaster General Smith in making the investigation and revoking the award was acting in good faith;

(*e*) Whether (proposed Finding X) appellee understood after the award was made that he did have not a contract.

For the purposes of brevity reference will only be made to this matter as set forth in appellant's motion for an order on the Court of Claims to make and certify findings of fact on file herein. Suffice it to say that had the court found the facts set forth in the proposed findings, or ultimate findings therefrom, it must have found that appellee made a misrepresentation to Postmaster General Gary of his ability to perform, thereby deceiving him, and that Postmaster General Smith not only acted in good faith in annulling the award, but in his exercise of a judicial function and in fairness to competitors of appellee must have acted as he did.

All of the matters of fact set forth in the proposed Findings I to X, inclusive, and XIX are based upon evidence of record in the court below.

As the defense on this phase of the case was not only the Postmaster General's right to review the award, but also because of misrepresentation on the part of appellee, the Government understands the rule to be that the facts revealing the misrepresentation should be found and hence its reason for setting forth *in extenso* in the proposed findings those facts which would demonstrate the misrepresentation and put this court in the position of being able to review the whole situation and determine whether ultimate findings should be made by the court below. (*United States* v. *Pugh*, 99 U. S. 265, 270–271.) Had the court found that the information brought to Postmaster General Smith was true and the represen-

tations made to Postmaster General Gary before the award were false, then it must have held that Postmaster General Smith acted within his rights and was warranted in vacating the award to appellee.

As the charge of acting "without any just, legal, or reasonable cause whatsoever," goes to the crux of this branch of the case, it is only fair that every possible light should be thrown upon the action of the Postmaster General to explain the same. By reference to Finding I it is seen that appellee failed to complete the contract for 1894, but sublet the same to the Morgan Plimpton Company after fifty or sixty million plain stamped envelopes and newspaper wrappers had been manufactured by appellee, despite the fact that the contract of 1894, by its specifications, stated that the contract should not be transferred or assigned. This requirement in the contract of 1894, as in the instant contract, was not a vain thing, for the personal equation in such a contract was of very great importance to the Government. It was for stamped envelopes and wrappers, which had a market at all times, and once in the market it would be impossible to trace their source.

The question of the protection of the dies from theft, destruction or counterfeit was of no small moment to the Government. The dies and hubs to be used for embossing the stamped envelopes, belonging to the Government, were not to be turned over to appellee until after the execution and approval of the contract. (Rec. 12.)

For these and many other reasons the Government had the right to know before signing the contract whether appellee would be able to fulfill the same. The question which would naturally arise in the mind of Postmaster General Smith would be, did appellee intend to assign the contract of 1898, despite the specification forbidding it to do so (Rec. 18), as it had done in 1894? Apparently it was not to its profit to carry the contract through in 1894, and obviously from Finding I it did not have the plant. There is nothing in the record to show that it had any better plant in 1898.

In view of the facts presented to Postmaster General Smith as to the inability of appellee to perform, and in view of the Government's experience with appellee in 1894 when it sublet its contract in contravention of section 3737 R. S., the Postmaster General in annulling the award undoubtedly believed he was striking at the root of one of the greatest evils that confronts the Government in doing business. This court has said in *Tool Company* v. *Norris*, 2 Wall. 45, 54:

> All contracts for supplies should be made with those, and with those only, who will execute them most faithfully, *and at the least expense to the Government.* Consideration as to the most efficient and economical mode of meeting the public wants should alone control, in this respect the action of every department of the Government.

For a person to secure a contract from the Government and sublet the same means simply the loading of the contract with the commission or profit that this individual intends to obtain for his services. Such a practice is not efficient or economical. The Government has the right to deal directly and to have the benefit of the personal knowledge of the party with whom it is dealing. It was for this purpose that section 3737, R. S., forbidding the transfer or assignment of a contract or any part thereof with the Government, was enacted. Since there is nothing in the findings to show that appellee was in any better position to carry out the contract in 1898 than in 1894, did not the Postmaster General have the right to presume, in view of what had been presented to him as to appellee's financial standing, that appellee contemplated subletting the contract as in 1894, thus costing the Government appellee's commission or profit loaded upon what ought to have been the normal contract price? Such a presumption can be the more readily indulged in when one compares the difference in the cost of the bid prices for the envelopes made by appellee and accepted (Rec. 35) and the contract prices for envelopes made by the Plimpton Company and accepted (Finding XVII, Rec. 56, 58), the concluding part of which states that "under the new four-year contract [Plimpton Company contract] the reduction will be, counting probable increase of issues, about $350,000 a year, or for the whole term of the contract $1,400,000."

If appellee had in mind subletting the contract, he, of course, would have included a profit to himself. The foregoing figures demonstrate with unquestionable accuracy the amount with which he would have loaded the contract, for the Plimpton Company was an old and established firm and the prices they contracted for undoubtedly gave them a reasonable profit.

In view of the situation as revealed by the findings, can it be said that Postmaster General Smith in annulling the award acted without just, legal, or reasonable cause?

THIRD.

Assuming, for the sake of argument only, that there was a contract, then the damages found were excessive in that: (a) Anticipated profits were allowed on more envelopes than the contract called for; (b) the court failed to include in the expense of performing the contract the necessary cost to appellee in purchasing or otherwise acquiring the Wickham envelope machines; (c) no deduction was made from the judgment on account of appellee's release from the risk, etc., attending the execution of the contract.

(a) Anticipated profits were allowed on more envelopes than the contract called for.

Should the court hold that there was a contract, then the Government maintains that the judgment was erroneous and excessive. Appellee based its ground for recovery in the matter of anticipated profits on the difference between the cost of making and furnishing all of the envelopes and wrappers used during the period of four years dating from the first day of October, 1898, and the amount paid to

Plimpton Company. It refers to the contract (Rec. 20) as follows:

> First. That the said contractor shall furnish and deliver promptly and in quantities as ordered, and subject to the approval of the Postmaster General in every respect, all the stamped envelopes and newspaper wrappers that *it may be called upon by the Post Office Department to furnish* during the four years beginning on the first day of October, 1898, etc. [Italics ours.]

This language is further limited by that found in the specifications (Rec. 17), where it says:

> It must be understood, however, that any proposal made under the advertisement and these specifications shall impose the obligation to furnish at the prices bid all the envelopes and wrappers that *may be ordered* by the department during the contract term *without regard to the quantities above given, subject to the provision as to those on hand at the termination* of the present contract. [Italics ours.]

The paragraph of the contract which provides for envelopes and wrappers on hand at the termination of the present contract is as follows (par. 13, Rec. 28):

> 13. That the department shall, after satisfactory inspection, accept and pay for, at the regular contract prices, the stock of stamped envelopes and wrappers that may remain on hand at the close of the contract term; and the contractor may be required to issue them subject to the conditions of the contract, but provided that such stock shall not exceed in quantity the average requirements of the

> department for a period of fifteen days; and any surplus over that quantity may be destroyed, at the discretion of the Postmaster General, without any compensation therefor.

The foregoing paragraph, read with the other paragraphs heretofore referred to in this connection, requires the contractor to furnish envelopes and wrappers in such number as may be called for by the department, but the *quantities* or kinds or qualities which go to make up the total number called for as estimated in the specifications may be disregarded. For example, the number of No. 1 first quality envelopes estimated at 481,000 issues might be increased and the quantity estimated for No. 2 decreased, and so on throughout the entire list. This would not affect the maximum quantity which might be called for, to wit, not to exceed in round numbers 600,658,000 annually, or 2,402,632,000 during the four-year period. This was the basis of the contract (R. 16) and the department could not have been compelled to take more.

The language of the contract protected the appellee from an emergency call under Section 3709 of the Revised Statutes such as there was in this case and which was met by the Plimpton Company (R. 54, F. XVI), and by a parity of reasoning releases the Government from paying appellee anticipated profits on any of the envelopes and wrappers furnished under the emergency call.

Yet the court in its judgment has included as the basis thereof those envelopes ordered under the emergency call.

As will be seen from Finding XVIII (R. 58), the court has not separated the item under the emergency call from the item under the four-year contract given to the Plimpton Company, and it was for the purpose of finding out what items composed the total of 3,050,237,250 envelopes and wrappers that the Government requested the court to grant the proposed Finding XXV (Rec. 75).

If the item under the emergency contract were eliminated from the 3,050,237,250 envelopes and wrappers, there would be left the number of envelopes and wrappers manufactured under the Plimpton contract. This, however, can not be the basis of an allowance for anticipated profits to appellee, for he is confined to profits on whatever claim he had at the time the award was annulled, if at all, instead of waiting until the four-year period had passed to determine how many envelopes and wrappers had been used by the Government. The number that he was entitled to at the time of cancellation is clearly revealed by reference to that part of the specifications (Rec. 16) wherein it says, under the heading "Basis and Manner of Award" that:

> The contract will be awarded on the basis of the issues in round numbers, of corresponding sizes and qualities, for the year ending December 31, 1897, as follows:

And then follows an itemized statement of the numbers estimated under 14 different qualities and totaling 600,658,000 annually. For the four-year period this would have amounted to 2,402,632,000. If there was a contract, then the claim for anticipated

profits should have been based on this number rather than on 3,050,237,250. *Merriam* v. *United States*, 107 U. S. 437, 444.

The court was requested to state whether the basis of its judgment included the issues of envelopes and wrappers purchased under the emergency contract, and if so how many issues were so included. (Rec. 75, F. XXV.) Where there is an outstanding contract for envelopes the Postmaster General has the right to enter into an emergency contract during the same period, but he can not charge the excess cost thereunder to the four-year contract. *Plimpton Manufacturing Co.* v. *U.S.*, 15 C. Cls. 14; 21 A. G. Op., 181.

For a like reason the contractor can not appropriate to his benefit the subject matter involved in an emergency contract growing out of public exigency as the basis for a valid claim.

(b) The court failed to include in the expense of performing the contract the necessary cost to appellee in purchasing or otherwise acquiring the Wickham envelope machines.

The court made the following finding (Rec. 53):

> Claimant, contemplating making the envelopes under its said contract on the Wickham envelope machines, entered into negotiations with Horace J. Wickham whereby he promised to furnish claimant with a sufficient number of said machines on which to perform said (envelope) contract, and to have some of them ready before the beginning of the contract term, October 1, 1898.

The Wickham machine referred to made the envelope in one operation (Rec. 44, 45, Finding I), and was the latest type of machinery for such work.

(Rec. 53, Finding XII.) At the time in question the plant of another company located at Hartford, Conn., was the only one in the United States equipped with the Wickham machines. (Rec. 44, 45, Finding I.) Appellee's plant was not equipped with them, but with "ordinary envelope folding machines." (Rec. 44, Finding I; Rec. 53, Finding XII.)

So far as the findings in this case are concerned there is nothing to show that the court, as an incident to the cost of performance of the contract, considered the cost of the Wickham machines to appellee, although evidence of the same was submitted to it. (Rec. 74, 75, Finding XXIII, pars. 5, 8.)

In order to have supplied the 3,050,237,250 envelopes and wrappers during the four years beginning October 1, 1898, it would have been necessary to manufacture the same at the rate of approximately two and one-half millions per day, which could have been done only on the Wickham machines. The capacity of appellee's plant was only 2,000,000 per day. (Rec. 44, F. I.) Hence the importance of having it clearly determined what amount, if any, the court allowed for the use of said machines, a matter which the Government attempted to have the court find, but without avail. (Rec. 74, 75, Finding XXIII, pars. 5, 8.)

Had the court found the cost thereby incurred the same would have reduced the amount of the judgment if subtracted from the anticipated profits. If the court did find this item, and did consider it in arriving at the judgment, appellant is entitled to know this. *United States* v. *Smith*, 94 U. S. 214, 218.

(c) No deduction was made from the judgment on account of appellee's release from the risk, etc., attending the execution of the contract.

A most casual reading of the specifications reveals (Rec. 23, pars. 5 to 10, inclusive; Rec. 27, pars. 3 to 14, inclusive) the fact that appellee would be involved in risk in the carrying out of the contract. So far as the findings are concerned it does not appear that the court allowed a reasonable deduction from the amount of the judgment by reason of appellee's release from care, trouble, risk, and responsibility attending the performance of the contract.

It was for the purpose of clarifying this situation that the Government submitted the proposed Finding XXIX. (Rec. 67, 76.) The Government maintains that if no deduction has been allowed, the judgment should be subjected to the same. If, on the other hand, an allowance has been made the Government maintains that it has the right to know the amount so deducted.

United States v. *Speed*, 8 Wall. 77–84.

Insley v. *Shepard*, 31 Fed. 869, 873.

McMaster v. *The State of New York*, 108 N. Y. 542, 543.

Danforth v. *Tennessee & Coosa R. R. Co.* 93 Ala. 614, 620.

It is respectfully submitted that the judgment should be reversed and the case remanded with an order to the lower court dismissing the petition.

HUSTON THOMPSON.

J. ROBT. ANDERSON,

Attorney.

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CASES CITED.

OTHER REFERENCES.

In the Supreme Court of the United States.

OCTOBER TERM, 1918.

THE UNITED STATES, APPELLANT,
v.
THE PURCELL ENVELOPE COMPANY,
Appellee.
No. 168.

APPEAL FROM THE COURT OF CLAIMS.

APPELLANT'S MOTION FOR AN ORDER ON THE COURT OF CLAIMS TO MAKE AND CERTIFY FINDINGS OF FACT, AND BRIEF.

Now comes appellant, by the Solicitor General, and moves the court for an order directed to the Court of Claims requiring said court to make and certify as part of the record here, findings of fact on the several questions of fact following, to wit:

1. Whether the court included in the cost of materials, or other cost incident to the execution of the contract (as a basis for its judgment Finding XX), anything on account of the purchase of the Wickham envelope machines by the claimant, and, if so, what amount was included therefor.

2. Whether it would have required about 75 Wickham envelope machines to make two and a half million envelopes per day, and if not, how many of

said machines would have been required therefor, and at what cost and expense to claimant (R. 67, 74–75, XXIII, 5, 8).

3. Whether the sum of all the various issues, envelopes and wrappers, which was to be the basis in round numbers for which the contract was awarded, was 600,658,000 annually (p. 78), and, if not, what number did furnish the basis of the contract.

4. Whether the court included in the quantity of envelopes and wrappers called for by the Post Office Department during the four years, beginning October 1, 1898, all, or any part, of the envelopes and newspaper wrappers which were purchased under the provisions of section 3709 of the Revised Statutes, and as set out in Finding XVI of the court, and, if so, how many issues of envelopes and newspaper wrappers were so included, and was the profit mentioned in Finding XX, calculated on a basis which included the envelopes and wrappers which were purchased under the exigency stated in Finding XVI of the court (R. 67, 75, XXV 1, 2).

5. Whether the Purcell Envelope Co. (appellee) was released from the care, trouble, risk, and responsibility of performing any, or all the work required by the contract, and, if so, what amount was deducted from claimant's alleged profits, if any, on account of appellee being released from the care, trouble, risk, and responsibility attending a full and complete performance of the work covered by the contract during the four years beginning October 1, 1898 (R. 67, 76, XXIX).

And pertinent to the investigation conducted after the award and as tending to show that Postmaster General Gary had been imposed upon and deceived both with respect to the business and financial standing of the claimant, as well as its ability to perform a contract, and that the whole matter was still with the control of his successor, Postmaster General Smith, and was so treated by the parties, the court below was requested to make findings of fact on the following questions of fact, viz:

I.

Whether, according to the official report made by a proper officer of the Post Office Department during the investigation, referred to in Finding IV of the court, Mr. James Purcell made a statement with regard to the financial condition of the stockholders of the Purcell Envelope Co., and stated that he himself owned real and personal property of the value of $60,000, not including his interest in the company; that he had reason to believe that Mr. H. E. Townsend (who was claimant's vice president in 1898, p. 182, qq. 10–13) owned $30,000 or $40,000, and that Payn probably owned several hundred thousand dollars; and, if so, whether or not the report containing such information was transmitted to the Hon. James A. Gary, Postmaster General, prior to the award (p. 16, first paragraph under heading "Financial condition of company and its stockholders)." (R. 67.)

II.

Whether, on or about April 4, 1898, and prior to the award, the Purcell Envelope Co., by James Purcell, president, sent a written communication to Hon. James A. Gary, Postmaster General, Washington, D. C., in connection with its bid, wherein it was stated, among other things, that the company then had machinery in place guaranteeing a product of over two and a half million envelopes daily, a quantity far in excess of the demand of the Government; that it now had a magnificent brick factory at Holyoke, Mass., 100 by 60 feet, 6 stories high, and had fully equipped it with printing and embossing presses, envelope-folding and envelope-cutting machines, and every appliance for the manufacture of stamped envelopes; that it had expended nearly $200,000 on this plant; that the factory was ready to start at any time within 24 hours after notice is received; that it had superior facilities to those under which its present contract was being operated, and courted the fullest investigation as to its financial responsibility; that it was ready to sign the contract and give the required bond, and urged that the award be made to it (pp. 60, 61). (R. 68.)

III.

Whether after the award was made, and prior to July 22, 1894, and during the investigation which was instituted by Postmaster General, the Hon. Charles Emory Smith, to which reference is made in Finding XIV of the court, information was officially transmitted to the Postmaster General to the effect,

among other things, that little was known of Mr. Purcell's actual responsibility (p. 29, line 32); that Mr. Townsend had unsatisfied judgments standing against him (p. 29, lines 21, 46), and that his financial standing was not good; that judgments had been entered against Mr. Payn from time to time (p. 29, line 18); that the firm of which he was a member had practically failed, with assets estimated at $20,000 and liabilities at $40,000 (p. 29, lines 35–36); that he was said to be slow of payment and not known to have anything that could be reached (p. 29, lines 17, 18). (R. 68.)

IV.

Whether, after the award was made and through the investigation instituted by Postmaster General Smith, referred to in finding XIV of the court, official information was transmitted to that officer in the form of a report (pp. 25–30), which, among other things, stated that the Purcell plant at Holyoke, Mass., had been erected for Purcell by the Powers Paper Co., and that the latter was contingently interested in the success of the Purcell company (p. 26, lines 30–33), and expected to supply the latter with a part of the paper (p. 26, line 33); that a mortgage upon the Purcell plant was held by L. J. Powers (father of F. B. Powers, p. 26, line 29) which had cost the Powers's interests over $90,000 (p. 28, last line, first par.); that the Holyoke City Bank of Holyoke, Mass., would not lend Powers or the Purcell Envelope Co., and did not wish to do any business with them (p. 28, lines 26–28); that the bank had some dealings

with Purcell and Townsend; that Townsend was not satisfactory (p. 28, lines 25, 26); that the Holyoke Savings Bank would not lend them a dollar (p. 28, line 29); that the Holyoke National Bank never had any dealings with the Purcell Envelope Co., but had looked them up about four years ago before and concluded not to lend them, was of the same opinion still (p. 28, lines 42–44); that the Park Bank of Holyoke had a chance to do business with Messrs. Purcell and Townsend, but did not do it, and would not do it now (p. 28, lines 51–53); that the Chapin Bank and the John Hancock Bank of Springfield, Mass., would not give Purcell or his company accommodation unless the paper bore A1 indorsements (p. 27, lines 43, 44); that at the Second National Bank of Springfield (Mass.) the board would not pass their paper (p. 27, lines 45, 46); that the Springfield National Bank would not give any accommodation unless very satisfactorily indorsed (p. 27, lines 50, 51); that Mr. Purcell's personal check had several times been refused payment because of no funds to his credit (p. 28, lines 1, 2); that Mr. Townsend had an account there, but overdrew it about $18, and it took two or three months to get it (p. 28, lines 4–6); that in 1896 the general credit of the claimant was not good (p. 29, line 11); that the inspector making the report had heard that two or three of the company's notes had been protested, and there were other rumors concerning its financial standing (p. 27, lines 33–36); that the company consisted of James Purcell, L. F. Payn, H. E. Townsend, and Henry O'Brien, all of whom

lived in the State of New York (p. 26, lines 22–26); that four years ago (1894) the Purcell Envelope Co. made envelopes about a month (p. 27, lines 3 and 4); that during that time it contracted with Mr. Powers for 40 envelope machines; that it accepted and paid for 10; that this was the machinery alleged to have been recently bought (p. 27, first par.); that the Morgan-Plimpton Co. assumed the contract for the other 30 machines, and that the contract was assigned to the latter company by Mr. Purcell; that the Morgan-Plimpton Co. stated that they would hold Powers to that contract, and that he would be compelled to deliver the 30 machines to them before he could make any more for Mr. Purcell (p. 27, pars. 1 and 2); that the Morgan-Plimpton plant was as nearly perfect as it was possible for human ingenuity and business common sense to construct (p. 26, lines 1 and 2), and could turn out nearly, if not quite, 4,000,000 envelopes for each working day (p. 26, lines 17–20). (R. 68–69.)

V.

Whether after the award was made, and prior to the date of the order set out in finding XIV, there was transmitted to the Postmaster General official information in the form of a report made by the proper officers of the Post Office Department, as a result of the investigation mentioned in said finding, to which report was attached, as Exhibit A, an affidavit (p. 30, line 39, and pp. 30, 31) purporting to have been made by Clarence Wolf, wherein it was stated, among other things, that the affiant had

been engaged for 20 years in the manufacture of envelopes (p. 30, third line from bottom of page); that on May 28, 1898, he had made a personal examination of the plant of the Purcell Envelope Co., at Holyoke, Mass. (p. 30, last two lines), which was an ordinary commercial plant, not up to present standard in efficiency; that the plant was idle (p. 31, lines 1, 3); that among the machines contained therein 22 were in fair condition and 5 in poor condition (p. 31, line 6); that the affiant found no facilities for making newspaper wrappers (p. 31, lines 7, 8); that he believed the Gordon presses could emboss and print 10,000 each (envelopes) in a day of 10 hours (p. 31, lines 11, 12); that he did not believe the Purcell plant, as then constituted, capable of executing the contract for printing stamped envelopes should the same be awarded to that company (p. 31, lines 27, 29). (R. 69–70.)

VI.

Whether, after the award was made, and prior to the date of the order set out in finding XIV of the court, there was transmitted to the Postmaster General an official report made by the proper officers of the Post Office Department, as a result of the investigation mentioned in said finding, to which was attached, as Exhibit B, an affidavit (pp. 31–32) purporting to have been made by Joseph F. Roberts, wherein it was stated, among other things, that the affiant was by trade a machinist and an adjuster of envelope machines, and on May 28, 1898, he made a personal examination of the plant of the Purcell

Envelope Co., of Holyoke, Mass.; that, among other machines found therein, there were 10 Leader machines in fair condition, 14 Berlin & Jones machines not in good condition, but could be put in good condition in a month, if enough help was employed; that there were 11 Standard (Piper) machines in fair condition and 5 Ermold machines in fair condition; that affiant estimated that the Gordon presses could each print and emboss 12,000 envelopes in a day of 10 hours. (R. 70.)

VII.

Whether in a letter of (Senator) O. H. Platt to Chas. Emory Smith, Postmaster General, Washington, D. C., dated April 25, 1898, it was stated:

> I hope you will not sign this contract (which had been awarded to the Purcell Envelope Co. by Postmaster General Gary on Apr. 20, 1898) until you have an opportunity to fully investigate it, both from a business standpoint and as to the influences which have been used to secure it, and that you will, at an early date, give an interview to the parties whom it was decided against (p. 20). (R. 70–71.)

VIII.

Whether, in a letter to Plimpton & Morgan companies, by M. S. Chapman, attorney, to Chas. Emory Smith, Postmaster General, dated May 6, 1898, it was stated:

> That the stamped-envelope contract—bids for which were opened March 30, 1898—was

positively and legally awarded to us, and that the subsequent award to the Purcell Envelope Co. was not a just or legal award (p. 22). (R. 71.)

IX.

Whether, on May 6, 1898, Jas. T. Abbe, president, wrote to the honorable the Postmaster General a letter of that date, wherein, among other things, it was stated that the Holyoke Envelope Co., which had submitted a bid for furnishing stamped envelopes and newspaper wrappers to the Post Office Department in response to its advertisement, dated February 28, 1898, the writer had reason to believe that bidders were not treated fairly; that the Holyoke Envelope Co. "was treated * * * with inexcusable unfairness in the Third Assistant Postmaster General's Office" (p. 21). (R. 71.)

X.

Whether, subsequent to the award, according to statements contained in the report of an officer of the Post Office Department, during the investigation, mentioned in Finding XIV of the court, Mr. Jas. Purcell participated by submitting to that officer certain papers which were attached to the officer's report as Exhibits "C, D, E, F, G, H, I, J, K, L, M, N, O, and P" (p. 39); and also whether or not Mr. Purcell acquiesced in such investigation being made (p. 27, lines 39 and 40; p. 30, lines 23–26 and 38–40). (R. 71.)

XIX.

Whether Postmaster General Smith, in making the investigation into the facts and circumstances (to which reference is made in Finding XIV of the court) surrounding the making of the award and the entering of the order revoking the same, on July 22, 1898, and notifying the claimant thereof, acted in good faith. (R. 73.)

The Court of Claims failed to make findings of fact on any of the foregoing requests, or to state the ultimate facts with respect thereto.

Wherefore appellant prays that an order be issued herein directed to the Court of Claims requiring said court to make and certify as part of the record here findings of fact on the several questions of fact above set forth.

Appellant also moves the court in the alternative to remand the case to the Court of Claims for such further proceedings as it may direct.

ALEX. C. KING,
Solicitor General.

STATEMENT.

This suit was brought in the Court of Claims for the recovery of damages for the breach of an alleged contract for furnishing stamped envelopes and newspaper wrappers to the Post Office Department. The amount so claimed in the second amended petition was $675,000. It is charged that the Postmaster General failed to call upon appellee to furnish any envelopes or wrappers during a four-year period beginning October 1, 1898, thereby causing a breach of the alleged contract. The paper writing which is referred to in the proceedings as the contract "to be entered into" appears in the record as "Claimant's Exhibit A" following the petition (R. 7–29). While this paper was signed by appellee, it was never signed by the Postmaster General (R. 29).

On February 28, 1898, the Postmaster General advertised for proposals for furnishing the Post Office Department with stamped envelopes and newspaper wrappers in such quantities as might be called for by the department during a period of four years beginning October 1, 1898 (R. 8). The specifications stipulated that the contract would be awarded on the basis of the issues in round numbers for the year ending December 31, 1897, or 600,658,000 annually (R. 16), of such envelopes and newspaper wrappers (the number of such issues being the total number of the various quantities mentioned in the specifications).

On March 30, 1898, appellee submitted its proposal for furnishing stamped envelopes and newspaper wrappers in accordance with the specifications for the sum of $467,206.18, which was based on the number of envelopes and wrappers issued during the year ending December 31, 1897 (R. 19: 45–46, F. III), or 600,658,000 annually (the total of all the issues stated in the specifications), an aggregate during the four-year period of 2,402,633,000 issues, which in conformity with the bid on this basis would make the total contract price ($467,206.18 x 4) $1,868,824.72. The court has found that the cost of the paper alone to the appellee would be $1,845,248.60 (R. 59). The cost of the paper does not include the cost of making and delivering the envelopes, nor the expense to appellee in acquiring the Wickham machines upon which to make them, hereinafter more particularly referred to.

Appellee agreed that in the event of the acceptance of its bid "to enter into contract" as required (R. 46).

On April 20, 1898, Postmaster General Gary accepted appellee's bid, and on the same day the latter was notified that the contract had been awarded to it (R. 49–50, F. IV & V).

On April 21, 1898, a contract in quadruplicate and which had been referred to in the specifications (R. 17, 18, 19) was awarded to the appellee for execution (R. 50). This contract is embodied in the record as "Claimant's Exhibit A" (R. 7–29).

On April 22, 1898, the written contract was signed by appellee and its sureties and returned to the

Third Assistant Postmaster General, but was nevre signed by the Postmaster General (R. 51, F. VIII, 29).

On April 27, 1898, appellee was notified through the Third Assistant Postmaster General that the Postmaster General had not signed the contract and was holding the matter in abeyance (R. 52). A previous letter, that of April 21, tends to show that negotiations were still in progress (R. 51).

On July 22, 1898, the award of a contract to the appellee was revoked and canceled and declared to be null and void; and all letters and notices from any officers of the Post Office Department addressed to appellee advising it of the award were recalled and annulled. Before this action was taken, however, Postmaster General Smith had instituted an investigation into the business and financial standing of appellee with the result that the report thereon was unfavorable to appellee (R. 53–54, F. XIV).

On July 26, 1898, the Postmaster General entered an order requiring the Plimpton Manufacturing Co. of Hartford, Conn., and the Morgan Company of Springfield, Mass., to furnish all the envelopes and newspaper wrappers which might be required between October 1, 1898, and January 1, 1899. The envelopes and wrappers so purchased were procured under the provisions of section 3709 of the Revised Statutes, authorizing the head of a department to procure supplies by open purchase or contract in case of a public exigency (R. 55–56). The contract so made is referred to herein as the emergency contract.

On October 25, 1898, the Postmaster General duly entered into a written contract with the companies then furnishing envelopes and wrappers to the Post Office Department under the emergency contract for the furnishing of stamped envelopes and wrappers that the Post Office might call for during the four-year period beginning January 1, 1899 (R. 56–58, F. XVII).

During the four years beginning October 1, 1898, both under the emergency contract and under the four-year contract beginning January 1, 1899, the Plimpton-Morgan companies furnished 3,050,237,250 issues of envelopes and wrappers, for which they were paid $2,460,556.22 (R. 58, F. XVIII).

The Court of Claims rendered judgment against the United States for the sum of $185,331.76, Chief Justice Campbell dissenting (R. 66). Said judgment purports to represent the profit appellee would have made in furnishing 3,050,237,250 issues, but it is not clear at what prices.

The Government maintains that a contract was never consummated between the parties and was only in the making.

On that question it is submitted that all the requests embodied in the motion are material.

If it should be finally held that an express contract was entered into and consummated, then it is maintained that the several requests become material on the question as to the measure and amount of damages.

The motion is based upon the following grounds:

First, that appellant requested the Court of Claims to make findings of fact upon the several questions of fact set forth in the motion.

Second, that such questions of fact are material and pertinent to the issues involved.

Third, that the Court of Claims failed to make the findings requested, or any of them, or to state any reason for such failure, although there was evidence in support thereof.

The several requests for findings of fact on questions of fact embodied in the motion and presented to the Court of Claims will for the purpose of a limited discussion in our brief be grouped as to subject matter under the following headings:

1. What was the cost of the Wickham Envelope Machines to appellee and was this item included in the cost of the performance of the contract? (Requests 1 and 2 of the motion.)

2. What was the number of envelopes and wrappers upon which the court based its judgment for anticipated profits? (Requests 3 and 4 of the motion.)

3. What amount, if any, was deducted from the cost for release from risk attending execution of the contract? (Request in paragraph 5 of the motion.)

4. What misrepresentation on the part of appellee, if any, did the investigation, conducted by Postmaster General Smith after the award, disclose? (Requests I to X, inclusive, and XIX of the motion.)

I.

What was the cost of the Wickham envelope machines to appellee and was this item included in the cost of the performance of the contract?

The court erred in failing to make findings of fact responsive to requests 1 and 2 of the motion, relative to the cost of Wickham machines to appellee, as an incident to the performance of the contract, although evidence of the cost was submitted to the court. (R. 74–75, XXIII, 5, 8.)

The court erred in failing to include in the cost, incident to the performance of the contract by appellee, any sum which it would have necessarily incurred in purchasing or acquiring the Wickham machines.

In order to supply 3,050,237,250 envelopes and wrappers during the four years beginning October 1, 1898 (R. Finding XVIII) it would be necessary to manufacture the same at the rate of approximately two and one-half millions per day, which could only be done on the Wickham machines.

The court has found that appellee contemplated making the envelopes on the Wickham machines (R. 53, Finding XI), which made the envelope in one operation (R. 44–45, Finding I) and was the latest machinery for such work (R. 53, Finding XII). At the time in question the plant of another company located at Hartford, Conn., was the only one in the United States equipped with the Wickham machines (R. 44–45, Finding I). Appellee's plant was not equipped with them, but with "ordinary envelope folding machines" (R. 44, Finding I; R. 53, Finding XII).

Hence there was the necessity of purchasing or acquiring the Wickham machines by appellee. The cost of the Wickham machines would necessarily be large. It is not accounted for, either in the judgment or referred to in the findings. The court was therefore requested to find the number of these machines required to do the work and the cost to appellee. The court was also requested to state whether or not it had included in the cost of materials, or otherwise, the cost of these machines to appellee, and, if so, what amount.

The request called for material facts, since the Wickham machines would have been necessary in the performance of the contract in question, and appellee's theoretical profits ought to be reduced in an amount equal to the cost of the Wickham machines, or at least a fair rental value thereof during the period of the contract. There is nothing in the present findings, or in the amount for which judgment is rendered, tending to show that the cost of the Wickham machines is estimated as an item in the damages awarded, and, if so, what amount. (*United States* v. *Smith*, 94 U. S. 214, 218.)

II.

What was the number of envelopes and wrappers upon which the court based its judgment for anticipated profits?

The court erred in failing to make findings on the foregoing questions of fact presented in paragraphs 3 and 4 of the motion. It should have done so, as the award was upon the basis of furnishing in round numbers 600,658,000 issues annually (the total num-

ber per year set out in the advertisement, R. 16). Appellee's bid of $467,206.18 (R. 19) was also submitted upon the basis aforesaid, or for (600,658,000 x 4) 2,402,633,000 envelopes and wrappers during the period of four years, beginning October 1, 1898. A judgment based upon the furnishing of 3,050,237,250 (F. XVIII) envelopes and wrappers is in excess of the amount just stated and would be erroneous, for the reason that the department could not have been compelled to take more than the quantity specified in the advertisement, and for which appellee submitted its bid.

The total cost for the quantity of envelopes so specified, on the basis of appellee's bid therefor, could not have exceeded ($467,206.18 x 4) $1,868,-824.72. The court, therefore, erred in fixing the contract price, in its judgment, at $2,275,224.46 (R. 59, F. XX).

Hence the request of the court (R. 75, XXV) to state the number of issues upon which the judgment was based. The language employed in the specifications (R. 16) limits that language in the contract (R. 20) for furnishing envelopes and wrappers in such quantities "as may be called for by the Post Office Department," and makes the maximum that the Government could have been compelled to take the amount estimated per year times the number of years of the contract period, or 2,402,633,000, instead of 3,050,237,250, the number upon which the judgment is inferentially based. (*Merriam* v. *United States*, 107 U. S. 437, 444.)

It appears from the present findings that while the award had been made by the Postmaster General (R. 49, F. IV) an investigation was afterwards made into the business and financial standing of the claimant, and the report thereunder was unfavorable; that thereupon the award was canceled (R. 53–54, F. XIV). The Postmaster General then entered into an emergency contract with other companies under the provisions of section 3709 of the Revised Statutes relating to the authority of any department of the Government, in case of public exigency, to procure supplies by open purchase or contract. The existing contract for envelopes expired by limitation on September 30, 1898. Under the emergency contract the contractors were ordered to furnish "all the stamped envelopes and newspaper wrappers which may be required by the Post Office Department between October 1, 1898, and January 1, 1899." (R. 55.)

The emergency purchase could form no basis for a claim against the United States by appellee, especially if the number so purchased was in excess of the quantities stated in the specifications. Inferentially, the court has included as the basis of its judgment all the envelopes and wrappers that were purchased under the emergency contract, as well as all others purchased during the four-year period. The court was therefore requested to state whether the basis of its judgment included the issues of envelopes and wrappers purchased under the emer-

gency contract, and if so, how many issues were so included (R. 75, XXV, 2). Where there is an outstanding contract for envelopes, the Postmaster General has the right to enter into an emergency contract during the same period, but he can not charge the excess cost thereunder to the four-year contractor.

The Plimpton Mfg. Co. v. *United States*, 15 C. Cls. 14; 21 A. G. Op. 181.

For a similar reason the contractor can not appropriate to his benefit the subject matter involved in an emergency contract growing out of a public exigency as a basis for a valid claim.

III.

What amount, if any, was deducted from the cost for release from risk, etc., attending the execution of the contract?

The court erred in failing to make a finding of fact on the foregoing questions of fact. (Par. 5 of the motion.)

The court erred in failing to make a reasonable deduction from the amount of the judgment by reason of appellee's release from care, trouble, risk, and responsibility attending the performance of a contract.

Besides the risks, etc., which the law contemplates, the contract itself gives notice of a variety of hazards that may be encountered. The sizes and qualities of the envelopes were subject to discontinuance, in which event the contractor was not entitled to any compensation for damages. The Postmaster Gen-

eral reserved the right to impose fines upon the contractor for failure to have on hand at any time a sufficient supply of envelopes with which to promptly meet all requisitions of the department. If the contractor failed to promptly furnish the same he was liable for the excess cost incurred by their purchase in the open market. For any such failure the contract might be annulled. (Rec. p. 28, pars. 7, 9, 11.)

The face of the record does not disclose any deduction from the judgment by reason of appellee's release, etc., from the performance of a contract. The Government maintains that it was proper to request the court to state whether the rule in this regard had been complied with, and if so, the amount deducted.

United States v. *Speed*, 8 Wall., 77–84.

Insley v. *Shepard*, 31 Fed., 869, 873.

Mc Master v. *The State of New York*, 108 N. Y., 542, 543.

Danforth v. *Tennessee & Coosa R. R. Co.*, 93 Ala., 614, 620.

IV.

What misrepresentation on the part of appellee, if any, did the investigation conducted by Postmaster General Smith disclose?

The court erred in failing to make findings of fact on the questions of fact embodied in requests I to X and XIX of the motion.

The 11 requests grouped under this heading tend to support five propositions constituting a part of the res gestæ and were relevant, first, for the pur-

pose of ascertaining whether or not appellee's officers prior to the award and for the purpose of securing the same had made certain representations to the Postmaster General concerning the financial responsibility of the company, its officers and stockholders, and also as to the capacity and equipment of their plant and what had been expended thereon. A statement of fact in this regard was sought by requests I and II. By the latter request, among other things, the court was asked to find whether prior to the award appellee had represented that it "then had machinery in place guaranteeing a product of over two and one-half million envelopes daily."

Even in a case where there is a state, or group, of evidentiary facts, the legal effect of which may be doubtful, the lower court should when requested put such questions into the record (*United States* v. *Pugh*, 99 U. S. 265, 270), and for a stronger reason should do so when a fact requested to be found involves an alleged misrepresentation vitally affecting the transaction.

And, second, for the purpose of ascertaining whether or not Postmaster General Gary had not been misled and deceived by certain representations made by appellee prior to the award, it was sought by requests III to IX, inclusive, to ascertain the ultimate facts with respect to appellee's actual financial standing and that of its officers, as well as the real condition of their plant, its capacity and equipment, the result of this investigation having been referred to in Finding XIV of the court. (R. 54.)

Third. Requests VII, VIII, and IX were designed to ascertain whether or not public officials and competitive bidders had lodged complaints with the Postmaster General soon after the award wherein it was claimed that the same was legally made to a competitive bidder and that the award to appellee "was not just or legal"; that other bidders had been treated "with inexcusable unfairness in the Third Assistant Postmaster General's office"; and further, whether the Postmaster General was requested or invited by a high public official to investigate "the influences which had been used to secure" the award. These charges, if true, were sufficient to vitiate the award of a contract to appellee.

The facts, complaints, and charges laid before the Postmaster General after the award, if the court had found such to be the fact, were sufficient to authorize that officer to make the investigation referred to in Finding XIV. If he found them to be true, or if they had the effect of showing the falsity of material representations made by appellee before the award and for the purpose of securing the same, then the Postmaster General was acting within his rights and powers in the premises, and was warranted in setting aside or vacating the award to appellee. Such a situation would tend to show that the action of the the Postmaster General was not "without any just, legal, or reasonable cause," as charged in the petition. (R. 5.)

Fourth, by request numbered XIX, the Court of Claims was asked to state whether or not the Post-

master General in making the investigation above referred to and in revoking the award was acting in good faith.

In *United States* v. *Ripley*, 220 U. S., 491, the acts of a public officer were challenged on a given state of facts. The case was remanded for the purpose of ascertaining whether or not his action was in good faith.

Fifth, by Request X, the court was asked to find another fact connected with the investigation referred to in Finding XIV of the court. Such fact related to the conduct of appellee's president during the investigation and as to whether or not that officer acquiesced and participated in the investigation made by the Postmaster General. The object of this request was threefold:

(*a*) That the investigation was both proper and justified.

(*b*) That the contemplated contract had not been consummated.

(*c*) That appellee's chief executive after the award was endeavoring to persuade the Postmaster General to make or enter into a contract and to convince that officer that it would be able to execute it, notwithstanding the facts laid before the Postmaster General to the contrary.

APPELLANT'S MOTION IS WELL TAKEN.

Every party to an appeal has a right to have all the material ultimate facts, established by the evidence, found by the lower court. Where it is shown

upon appeal that material facts have been presented but not acted upon by the Court of Claims the case will be remanded for findings of fact sustained by the evidence.

United States v. *Adams*, 9 Wall., 661;
Mayham v. *United States*, 14 Wall., 109;
United States v. *Pugh*, 99 U. S., 265;
Driscoll v. *United States*, 131 U. S. App. CLIX.

The court will, sometimes of its own motion, remand a case to the Court of Claims for additional findings of fact.

United States v. *Ripley*, 220 U. S., 491; 222 U. S., 144.

The facts which are the subject of appellant's motion for additional findings were duly presented to the court, but the court overruled the motion. (R. 66–71, Requests I to X, inclusive. R. 73, Request XIX. R. 74, Request XXIII, pars. 5, 8. R. 75, Request XXV. R. 76, Request XXIX.)

CONCLUSION.

It is respectfully submitted that the order herein prayed for should be granted and the case remanded for further proceedings.

ALEX. C. KING,
Solicitor General.

HUSTON THOMPSON,
Assistant Attorney General.

○

No. 168.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1918

THE UNITED STATES, APPELLANT

v.

THE PURCELL ENVELOPE COMPANY,
APPELLEE

APPEAL FROM THE COURT OF CLAIMS

Appellee's Memorandum in Opposition to Appellant's Motion for an Order on the Court of Claims to make and certify findings of fact.

ARTHUR BLACK,
Attorney for Appellee

Supreme Court of the United States

OCTOBER TERM, 1918.

No. 168.

UNITED STATES, *Appellant,*

v.

THE PURCELL ENVELOPE CO., *Appellee.*

APPEAL FROM THE COURT OF CLAIMS.

APPELLEE'S MEMORANDUM IN OPPOSITION TO APPELLANT'S MOTION FOR AN ORDER ON THE COURT OF CLAIMS TO MAKE AND CERTIFY FINDINGS OF FACT.

The above case has been pending since 1902. After years of exhaustive preparation by both sides, argument of the case was begun in the Court of Claims on April 12, 1911, and continued for two days. The testimony required eight hundred pages of the Record and the brief of counsel for the United States, three hundred and fifty pages additional. The Court of Claims decided the case on December 4, 1911. The facts were found in detail and from this finding the Court decided as a conclusion of law that the claimant was entitled to recover from the United States

the sum of $185,331.76 and judgment for the claimant was entered accordingly (R. 43).

Motion for new trial was filed by the United States, based upon the ground therein alleged of newly discovered evidence. That motion was granted January 6, 1913 (R. 43).

More than three years after the new trial was granted, during which time counsel for the claimant made every effort to speed the proceedings, the case was again argued before the Court of Claims, March 30–31, 1916. About seventy-five pages of new testimony was considered in addition to the eight hundred pages of testimony taken before the first trial. A new counsel for the United States submitted a new brief of more than three hundred pages, in which all the defences of his predecessor were set up, together with such new ones as his own ingenuity could devise.

The argument required two days, and the Court of Claims, on April 14, 1916, made a complete finding of facts, on which it again decided, as a conclusion of law, that the claimant was entitled to recover from the United States the sum of $185,331.76, and judgment was entered accordingly (R. 66).

Again counsel for the United States, on June 13, 1916, filed a motion for a new trial and for amended and additional findings of fact (R. 66).

On December 18, 1916, this motion was denied (R. 66).

Thereafter, on January 4, 1917, counsel for the United States filed an application for the allowance of an appeal to the Supreme Court of the United States, but did not submit the same to the Court for action for three months. On March 6, 1917, the appeal was allowed.

On April 2, 1917, the Court of Claims allowed the United States to incorporate in the Record on Appeal its motion of June 13, 1916, which had been denied on December 18, 1916.

Now the latest counsel for the United States (the third in number) asks this Court to remand the case to the Court of Claims for further proceedings, and he bases this motion on the alleged necessity of having certain additional findings of fact in the Record on Appeal.

This motion, now made two years after the application for the allowance of an appeal to this Court, and presented on the eve of argument on the merits of that appeal, deserves no consideration. It is without merit, and if allowed can serve no purpose but delay.

REASONS.

I. The Court of Claims is the trial court on matters of this kind. On its findings of fact this Court must depend. This Court is not qualified, without consideration of all the testimony, to pass upon the findings of the trial court.

II. The subject-matter of the requests on which this motion rests has been discussed at great length in all the briefs and in all the oral arguments of all the counsel on both sides and at both trials. The requests contain not one idea that is new to counsel or to the Court of Claims. The subject-matter thereof, in so far as competent, material, and relevant, has already been found by the Court of Claims, and additional matter ignored.

III. These requests were submitted verbatim to the Court of Claims as the basis of a motion for a new trial, and additional findings of fact, and that Court fresh from the last trial, with the fullest possible knowledge of the case gained from two trials, innumerable motions, and the preparation of two decisions, denied a new trial and refused to make further findings of fact (R. 66).

The statement is made in the foregoing paragraph that "these requests were submitted verbatim to the Court of

Claims." This can be verified by a glance at the Record on Appeal, pages 67 to 76 inclusive. Requests in the motion before this Court, numbered by Arabic numerals 1 to 5, are identical with requests contained in the previous motion to the Court of Claims as they appear in the Record on Appeal as follows:—

Requests to Supreme Court.		*Requests to Court of Claims.*				
1	same as	XXIII	sub.	8	see	R. 75.
2	" "	XXIII	sub.	5	"	R. 74.
3	" "	XXV	sub.	1	"	R. 75.
4	" "	XXV	sub.	2	"	R. 75.
5	" "	XXIX			"	R. 76.

Requests in the motion before this Court, numbered by Roman numerals I to X inclusive, and XIX, are identical with requests contained in previous motion to the Court of Claims, as they appear by the same Roman designations in the Record on Appeal, pages 67 to 71 inclusive, and page 73.

IV. These requests, which did not warrant any action by the Court of Claims, gain nothing in presentation to this Court by a mere rearrangement of their sequence.

It is respectfully submitted that this motion should be denied.

ARTHUR BLACK,

Attorney for Appellee.

In the Supreme Court of the United States.

OCTOBER TERM, 1918.

THE UNITED STATES, APPELLANT,
v.
THE PURCELL ENVELOPE COMPANY, APPELLEE. | No. 168.

APPEAL FROM THE COURT OF CLAIMS.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

If it should be held that a contract was, in fact, entered into and breached by the Postmaster General, then it will be confidently insisted that the Court of Claims has applied an entirely erroneous rule of damages. And, in support of this contention, the court's attention will now be further directed to certain features of the contract as alleged and as found by the Court of Claims.

I.

Contract not for all stamped envelopes and wrappers needed during the period of the contract, but only for such as the Postmaster General should see fit to order from the appellee.

The Court of Claims has awarded damages on the theory that appellee had a contract which entitled it to furnish all the stamped envelopes and wrappers, of the sizes mentioned in the specifications, which the Post Office Department *should need* during the

four years' contract. But this construction of the contract finds no support, either in the claimant's petition, in the written contract which it signed as embodying its final understanding, or in any of the papers or orders preceding the signing of the contract. Appellee, when stating in its petition the substance of the contract, does not allege that the Postmaster General contracted to order from it all of those articles that might be needed. On the contrary, the allegation is that the claimant undertook, covenanted and agreed "to furnish and deliver, promptly as ordered, and subject to the approval of the Postmaster General, all the stamped envelopes and newspaper wrappers *that it might be called upon* by the Post Office Department to furnish during the four years," etc. (Rec. p. 1.)

In asking for bids the Postmaster General clearly had in mind the same idea, since he asked for proposals "for furnishing stamped envelopes and newspaper wrappers in such quantities as may be called for by the department during a period of four years," etc. (Rec. p. 45.) And in the written contract signed by appellee a recital of the advertisement for bids, the submitting of bids, and the awarding of the contract, is followed by the covenants entered into by the appellee, the first of which is—

> That the said contractor shall furnish and deliver promptly and in quantities as ordered, and subject to the approval of the Postmaster General in every respect, all the stamped envelopes and newspaper wrappers *that it may be called upon* by the Post Office Department

to furnish during the four years, etc. (Rec. p. 20.)

The eighth paragraph of the contract requires the contractor to keep on hand at all times a stock of finished envelopes and wrappers equal to an average ten days' supply. (Rec. p. 24.) The obligations to be assumed by the United States begin on page 25 of the record. They contain no obligation to order any particular quantity of the articles mentioned from the appellee. The obligation is simply—

> To pay the said contractor for the stamped envelopes and newspaper wrappers accepted and delivered in pursuance of this contract, subject to the reservation hereinafter stated, at the following rates, which shall be full compensation for everything required to be done or furnished as herein set forth * * *. (Rec. p. 25.)

"The reservation hereinafter stated" is as follows:

> That the department shall, after satisfactory inspection, accept and pay for, at the regular contract prices, the stock of stamped envelopes and wrappers that may remain on hand at the close of the contract term; and the contractor may be required to issue them subject to the conditions of the contract, but provided that such stock shall not exceed in quantity the average requirements of the department for a period of fifteen days; and any surplus over that quantity may be destroyed, at the discretion of the Postmaster General, without any compensation therefor. (Rec. p. 28.)

It is true that the specifications on which the proposal was submitted provided that "The contract will be awarded on the basis of the issues, in round numbers, of corresponding sizes and qualities, for the year ending December 31, 1897, as follows:" This was followed by a statement showing the number of each of the fourteen articles on which bids were asked which had been issued during the year 1897. The specifications, however, make it plain that there is to be no contract to take these or any other quantities annually during the four years. On the contrary, it is simply specified that these figures shall be used as a basis by the Postmaster General in determining which proposal in the aggregate is the best. The language used is:

> Bids must be made separately for every size and quality of stamped envelopes and wrappers in the foregoing list, the bidder stating in his proposal the price per thousand envelopes and wrappers, including everything required to be done or furnished, as set forth in these specifications, and the contract will be awarded as a whole to the lowest responsible bidder in the aggregate—the amount of the bid to be ascertained by extending the above numbers at the prices bid respectively, and then aggregating the amounts. It must be understood, however, that any proposal made under the advertisement and these specifications shall impose the obligation to furnish at the prices bid all the envelopes and wrappers that may be ordered by the department during the contract term without regard to the quantities above given, subject to the provision as to those on hand at

the termination of the present contract. (Rec. p. 17.)

It is perfectly plain, then, that the substance of the contract was that the appellee should be required to keep on hand at all times enough to meet the average requirements of the department for a period of ten days, and that in return for this undertaking and as a protection to the appellee the Government bound itself to take any stock that remained on hand at the end of the period, not exceeding enough to meet the average requirements of the department for fifteen days, and, in addition, the appellee undertook to fill all orders which the department might give it at the prices fixed in the contract. To fully comply with its contract the appellee was not bound to have on hand at any time more than a ten days' supply. If it manufactured more, with the result that it would have on hand more than fifteen days' supply at the end of the period, it did so at its own risk.

It is respectfully submitted that nothing can be found in the contract justifying the conclusion that the Government bound itself to take from the appellee at any time, or during the entire contract period, more than fifteen days' supply. If it had been permitted to go on with the contract, appellee might have been given very large orders and thus made large profits, but it could not have forced the giving of orders in excess of fifteen days' supply. In other words, the Government contracted to take, at all events, this limited quantity, with the option on its part to take as many more as it might see fit to order.

II.

Appellee entitled at most to the expenses incurred in getting ready to perform the contract and to the profits it would have derived from the manufacture and sale of fifteen days' supply of the articles contracted for.

This is not a case of partial performance by one party and a breach of contract by the other. It is a case where one party has prevented the other from performing. The case of the *United States* v. *Behan* (110 U. S. 338, 344) clearly lays down the rule of damages in such a case as follows:

> The *prima facie* measure of damages for the breach of a contract is the amount of the loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract, without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damage, namely: first, what he has already expended towards performance (less the value of materials on hand); secondly, the profits that he would realize by performing the whole contract. The second item, profits, can not always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires.

As to the profits, the appellee, of course, can recover only those which it would have derived from doing what, under the terms of the contract, the other party had no right to prevent it from doing. It had the right to manufacture enough articles to

supply the needs of the department for fifteen days, and if it had done so, the Government would have been bound to pay for them. At most, therefore, it is entitled to recover what its profits would have been on this number of articles. But since the contract does not obligate the Government to take and pay for more than this number, the Postmaster General could have performed the full obligation of the Government by ordering that number. Since the number that it would have manufactured if it had gone on with the contract was entirely dependent upon the will of the Postmaster General, it can not be said, with any degree of certainty, that it would have derived any profit in excess of what would have been derived from the manufacture of the number mentioned. It can not be doubted that the Postmaster General had the authority to make a contract in this form. There is no statute which requires him to make an exclusive contract for any period with a single contractor for supplies of this kind. He is prohibited from making a contract of any kind for a period exceeding four years, but there is no other limitation upon the kind of contract which he shall make.

The act of June 26, 1906 (34 Stat., c. 3546, pp. 467, 476), after providing for the extension of certain contracts then existing, provides that "thereafter the Postmaster General shall contract, for a period not exceeding four years, for all envelopes, stamped or otherwise, designed for sale to the public, or for use by the Post Office Department, the postal service, and other Executive Departments."

The only other limitation upon his right to contract is that, except in an emergency, purchases shall be made by advertising for proposals, as provided in section 3709 R. S., as follows:

> SEC. 3709. All purchases and contracts for supplies or services, in any of the Departments of the Government, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles, or performance of the service.

While he is required to advertise for proposals, he is not bound to accept the lowest bid, but may consider other things in determining which bid should be accepted. Under these statutory provisions he need not, therefore, make an exclusive contract with anyone. He may, if he thinks best and can secure satisfactory prices, contract with half a dozen contractors, for each to furnish all the articles that he may call for, and then place his orders as the public interest may require. It may, in fact, be the part of wisdom for him to do this. If advantageous prices can be secured, it may be well to have similar contracts with different contractors, so that if one proves unsatisfactory the orders may be placed with another without disturbing the usual routine of business. He may make these contracts with each for limited quantities to be furnished during the period of a month, a year, or any other period not exceeding four years. Each contract may be for a definite quantity only, or he may

attach to each an option to take an additional quantity if he sees fit. The obligation of the Government will, in either case, be fully performed by taking the definite quantities contracted for. And if, during the contract periods, market and other conditions change to the extent that the prices become excessive, the Postmaster General need not exercise his option to take the additional quantities, but may advertise for new proposals and make new contracts for his needs in excess of the definite quantities already contracted for. If any large outlay will be necessary to enable the contractor to produce the articles contracted for, and if this outlay will be useless for other purposes in the event he does not get a given number of orders, it may be foolish for him to enter into such a contract, but the courts can not assume to protect people against their own foolish or unwise contracts, and if one enters into a contract of this kind he is bound by it.

If it could be said that the law does not authorize contracts of this kind, the result would not avail the appellee anything. Neither it nor the Postmaster General attempted to make any other kind of a contract. If the contract that would have been made by the final execution of the paper signed by appellee was beyond the power of the Postmaster General to make, there was no contract, and appellee can not recover.

For the reasons stated, it is earnestly insisted that in no view of this case did the appellee ever have a contract under which the Government was bound to

take from it more than fifteen days' supplies of stamped envelopes and wrappers. This being true, there is no ground upon which it can claim more than its actual expenses and the profits that would have been derived from manufacturing this limited number of the articles contracted for. It follows that the conclusion of the Court of Claims that the appellee is entitled to recover all of the profits that it would have derived from meeting all the needs of the Post Office Department for articles of this kind during the period of four years is erroneous as a matter of law.

If there was nothing more than the petition alleges, an undertaking on the part of appellee to furnish all the stamped envelopes and newspaper wrappers that it might be called upon by the Post Office Department to furnish, the contract would clearly be no contract at all, because void for want of consideration and mutuality.

> A contract for the future delivery of personal property is void, for want of consideration and mutuality, if the quantity to be delivered is conditioned by the will, wish, or want of one of the parties.
>
> *Cold Blast Transportation Co.* v. *Kansas City Bolt & Nut Co.*, 114 Fed. Rep. 77, 81.
>
> *American Fine Art Co.* v. *Simon*, 140 Fed. Rep. 529.
>
> *American Cotton Oil Co.* v. *Kirk et al.*, 68 Fed. Rep. 791.
>
> *Velie Motor Car Co.* v. *Kopmeier Motor Car Co.*, 194 Fed. Rep. 324.

Oakland Motor Car Co. v. *Indiana Automobile Co.*, 201 Fed. Rep. 499.
Bulkley v. *United States*, 19 Wall. 37.
McCaw Mfg. Co. v. *Felder*, 115 Ga. 408.

If there was a valid contract at all, it was because the Government was bound to do something which could serve as a consideration for the things which appellee bound itself to do. As we have seen, however, the Government did not attempt to obligate itself to order any envelopes from the appellee, except as such an obligation may be inferred from its agreement to take and purchase not exceeding fifteen days' supply if appellee should have that much in stock at the end of the contract period. In view of this agreement the contract which the Government at one time intended to enter into, and which the appellee claims it did enter into, was simply this: The appellee agreed to keep on hand at all times as much as ten days' supply, and in addition to furnish all the envelopes and wrappers which the Postmaster General might call on it to furnish during a period of four years. The Government, on its part, agreed to pay for all such envelopes and wrappers as it should order and as should be delivered to and accepted by it, and, in addition, to take and pay for not exceeding fifteen days' supplies if on hand at the end of the contract period. In short, the Postmaster General contracted to take and pay for, during or at the end of the four-year period, fifteen days' supply, which appellee agreed to furnish, with the option on the part of the Government to take, and the obligation on the part of appellee to

furnish, such additional quantities as the Postmaster General might see fit to order.

It may be that these agreements on the part of the Government constituted a sufficient consideration to bind the appellee to perform its agreements, including that to furnish all envelopes and wrappers that might be called for. But assuming this to be true, each party could recover damages only for a breach of one or more of the agreements made by the other party. Thus, if the appellee failed to have on hand at any time ten days' supplies, or failed to fill any order given it, the Government could recover as for a breach of contract.

On the other hand, if the Government failed to pay for any of the articles accepted by it, or failed to take and pay for stock which it had agreed that it would take at the end of the contract period, the appellee would have the right to recover damages, but it could not recover on account of the failure of the Government to give it other orders, for the reason that the Government had assumed no such obligation.

What has been said is in accord with the construction which this court has put upon contracts as to which it could be much more plausibly argued than in the present case that they called for specific quantities.

In the case of *Merriam* v. *United States* (107 U. S. 437, 439, 444) there were contracts with the same party calling for the delivery of 1,600,000 pounds of oats, more or less, "or such other quantity,

more or less, as may be required from time to time for the wants of said station, between the first day of July, 1877, and the thirty-first day of December, 1877, in such quantities and at such times as the receiving officer may require." The oats called for were for use at a military station. The contractor furnished and the Government accepted the full 1,600,000 pounds, but during the time specified, additional quantities were needed and used at the station in question, and these were purchased from another contractor. The first contractor sued for damages, claiming that under his contract he had the right to furnish these additional quantities. It will be seen that the language used in the contract was somewhat ambiguous. The additional quantities to be furnished were such "as may be required from time to time for the wants of said station." This standing alone would probably be sufficiently definite and certain. The court, however, held that it was rendered uncertain and indefinite by the provision that the oats should be furnished "in such quantities and at such times as the receiving officer may require," the conclusion being stated in this language:

> The provision that the oats required for the wants of the station, over and above the quantity specifically mentioned in the contract, were to be delivered in such quantities and at such times as the receiving officer might require, may well be construed to leave with him a discretion to call for the additional oats or not, as in his judgment they were or were not neces-

> sary for the wants of the station; and if he required none, the appellant was bound to deliver and the United States to receive none.

In *Lobenstein* v. *United States* (91 U. S. 324, 325) the contract was to skin the beef cattle slaughtered for Indians at Fort Sill, and in consideration thereof to receive the hides at $2.00 per hide. The contract provided:

> That the said party of the second part shall have all the hides of beef cattle slaughtered for Indians at Fort Sill, Indian Territory, up to and including June 30, 1870, which the Superintendent of Indian Affairs at that place shall decide are not required for the comfort of the Indians; the number of hides to be about four thousand (4,000), more or less.

Later the Commissioner of Indian Affairs directed that the cattle should all be turned over to the Indian agent on the hoof and given out to the Indians, by whom they were killed and cut up. The result was that no cattle were slaughtered for the Indians at Fort Sill by anyone acting under the authority of the United States, and the contractor, therefore, obtained no hides, although he had gone to an expense in excess of $1,200 in preparing to carry out his contract. He sued for damages, but this court said:

> There was no obligation on the part of the United States to slaughter the cattle or any portion of them for the Indians; and they were only bound to deliver the hides of such as they did slaughter, in case the Superintendent of Indian Affairs did not decide that they were required for the comfort of the

> Indians. If he decided that all were required by the Indians, that excused the United States from delivery to Lobenstein. He did, in effect, so decide when the Commissioner directed that the cattle should all be delivered on foot. Lobenstein took this risk when he entered into the contracts, and he undoubtedly made his calculations of profits in case of success accordingly. (p. 329)

It is probably true in the present case that there was an expectation that the figures given for the year 1897 would probably approximate what might be called for in subsequent years. This court has said, however:

> There is a well-recognized distinction between the expectation of the parties to a contract and the duty imposed by it. Were it not so the expectation of results would be always equivalent to a binding engagement that they should follow.
>
> *Knox* v. *Lee*, 12 Wall. 457, 548.
>
> *Maryland* v. *Railroad Co.*, 22 Wall. 105.

This principle is illustrated in the case of *Lobenstein* v. *United States*, *supra*. In that case the contract stated in so many words that "the number of hides to be about four thousand (4,000), more or less." Undoubtedly, then, it was the expectation of both parties that the number of hides received would be approximately 4,000, but the court said (p. 330):

> The estimate of the number of hides as made in the contracts does not create an obligation on the part of the United States to deliver that number. That estimate was undoubtedly in-

> tended as a representation of the probable number of cattle that would be delivered to the Indians. In point of fact, the number actually delivered was very much less. Neither party could determine how many would be reserved by the Commissioner for the use of the Indians. Therefore, necessarily, when the contract was made, the number specified could not have been understood to be a guaranteed number. If that number or its approximation was not guaranteed, none was. It follows as a consequence that this claimant has no right of action. He took his risk, and insured himself in his anticipated large profits if his venture proved a success.

In the present case, whatever expectations may have been entertained, the contract does not contain any obligation on the part of the Government beyond that above stated.

It is therefore respecfully submitted that the Court of Claims was in error in allowing as damages the profits which appellee would have made if the Postmaster General had seen fit to order from it all the envelopes and wrappers which were purchased by him during the period of four years. The appellee, therefore, at most, is entitled to recover only the expenses, if any, it incurred in preparing to perform the contract, and the profits, if any, it would have derived from manufacturing fifteen days' supply of the articles contracted for.

Respectfully submitted.

WILLIAM L. FRIERSON,
Assistant Attorney General.

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CASES CITED

Supreme Court of the United States

OCTOBER TERM, 1918.

No. 168.

THE UNITED STATES, *Appellant*

v.

THE PURCELL ENVELOPE COMPANY, *Appellee.*

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

STATEMENT.

The facts in this case are fully set forth in the Findings of the Court of Claims (I to XX, see R. 44–59). Briefly stated they are as follows:—

The Appellee is a corporation organized under the laws of New York for the purpose of manufacturing envelopes. On February 28, 1898, the Postmaster General, acting for the United States, published an advertisement inviting proposals for furnishing all the stamped envelopes that might be called for by the Department during a four-year period beginning October 1, 1898 (R. 45). In response to this advertisement and in compliance with its terms the Appellee made a bid. Its bid was the lowest received,

and on April 20, 1898, the Postmaster General (Hon. James A. Gary), after investigating the business standing of the Appellee, made and entered Order No. 149, awarding the contract to the Appellee (R. 49). On the same day a copy of the order of award was mailed to the Appellee. On the next day, April 21, 1898, a contract in quadruplicate was sent by the Department to the Appellee with instructions to execute at once and return (R. 50). On this same day, April 21, 1898, the Department wrote the Appellee and gave detailed instructions for new designs to be used in printing the stamps (R. 51). On April 22, 1898, the Appellee executed the contract furnished by the Department, procured the Fidelity & Deposit Company of Maryland as surety to the amount of $200,000, and returned the contract, with the signature of the Surety, to the Department (R. 51).

On April 27, 1898, the Appellee notified the Department that it had contracted for its white and amber paper and had arranged for drawings (R. 51, 52). On the same day the Department notified the Appellee that the contract had not been signed by the Postmaster General and directed it to suspend action until further orders (R. 52).

After the award, and the mailing of the contract to the Appellee for execution, Postmaster General Gary was replaced by Hon. Charles Emory Smith. The contract was never signed by the Postmaster General, but on July 22, 1898, the new Postmaster General, Charles Emory Smith, issued Order No. 301 in which he declared his predecessor's Order No. 149, awarding the contract to the Appellee, null and void (R. 53).

The Appellee is the sole owner of the claim which is the subject of this action. No assignment of any part of it or interest therein has been made (R. 53).

On April 23, 1902, the Appellee brought suit in the Court of Claims. The case has been tried twice before the Court of Claims, which has on both trials awarded

the Appellee judgment against the United States for $185,331.76 (R. 43 and R. 66).

The case now comes before the Court on appeal by the United States.

Three questions are presented for consideration:—

1. The contract.
2. The breach.
3. The damages.

POINT I.

The Contract.

A valid and express contract was made between the Purcell Envelope Company and the United States on or about April 20, 1898, whereby the Purcell Envelope Company agreed to furnish all the stamped envelopes and newspaper wrappers which the Post Office Department might call for during a period of four years beginning on October 1, 1898, and for which the United States agreed to pay certain specified prices per thousand.

The documentary evidence of this contract, as found by the Court of Claims, is as follows:—

1. The advertisement for proposals (Finding II, R. 45).
2. The Appellee's proposal (Finding III, R. 45, 46, 47, 48, 49).
3. Order No. 149, awarding contract (Finding IV, R. 49).
4. Notice of the award (Finding V, R. 50).
5. Letter sending formal contract (Finding VI, R. 50).
6. Letter of instructions as to performance of contract and specifications (Finding VII, R. 51).

7. Copy of contract (R. pages 7 to 29) which was executed by Appellee and Surety, with a penalty of $200,000 for the performance (Finding VIII, R. 51).

8. Appellee's letter notifying Department of arrangements made for paper and drawings (Finding IX, R. 51–52).

9. Letter of Department ordering suspension of performance (Finding IX, R. 52).

There being no dispute as to the foregoing facts the only question is one of law. Do these facts constitute a contract?

The award of a contract by the Postmaster General, pursuant to an advertisement by him and a bid by the person to whom the award is made, constitutes a complete contract, as fully as if the formal contract had been reduced to writing and signed by the parties.

Garfielde v. *United States*, 93 U. S. 242.

The facts in the Garfielde case are exactly the same as the facts in this case up to the time the award was made. In each case the Postmaster General advertised for proposals, received bids, and made his award to the lowest bidder. Nothing further happened in the Garfielde case, except the notification to Garfielde that the award had been suspended. Nevertheless, the Supreme Court held that the proposal by Garfielde, and its acceptance by the Department, created a contract of the same force and effect as if a formal contract had been written out and signed by the parties. Opinion of Mr. Justice Hunt, 93 U. S., page 244.

The grounds for holding that there is a contract in this case are much stronger than in the Garfielde case. In the

Garfielde case nothing was done after the award, while in this case a formal contract was sent to the bidder by the direction of the Postmaster General, with a request to sign and return it, which was promptly done. The contract was also executed by a reliable Surety Company, as surety, for performance, in the sum of $200,000 (R. 50–51). Not only this, but the Department sent a letter of instructions for the execution of some of the work to be done under the contract, and in express terms acknowledged the contract as existing between the parties at the time (R. 51).

The principle of the Garfielde case has never been overruled. It is clearly stated in *Harvey* v. *United States*, 105 U. S. 671, at page 688, where the Court says: "*The written bid in connection with the advertisement and the acceptance of that bid, constitute the contract between the parties so far as regards the question whether the contract price embraced the coffer dam work.*" The Garfielde case is cited by the Court in support of the foregoing statement of law.

In *Adams* v. *United States*, 1 Ct. Cls. R. 192, the question arose as to whether a contract with the Navy Department was completed when the claimant's proposal was accepted by the Navy Department or when it was reduced to writing and signed.

The Court said in part: "*We think this contract was completed on the 28th day of June, 1862, when the claimant's proposal was accepted by the Navy Department.*"

In the case of *Profitt* v. *United States*, 42 Ct. Cls., R. 248, where it was sought to establish a contract upon the acceptance of a bid in response to an advertisement, the Court said:—

"*It is well settled that the common law rule, whereby all prior understandings are merged in the subsequent written contract, cannot be strictly applied to contracts of this character, because they are required to be made by*

advertisement, bids and acceptances. These three steps constitute the real contract, and the written instrument is merely a reduction to form of the intention of the parties as expressed in the prior advertisement, bid, and acceptance."

The Garfielde case, 93 U. S. 242, and the Harvey case, 105 U. S. 671, are cited by the Court in support of this rule.

Comment. It will be seen on examination of these, as well as other decisions upon the subject, that the principal, if not the sole question involved, is whether there is "a concurrence of the minds upon a distinct proposition manifested by an overt act." If so, there was a contract, otherwise not. This case is replete with conclusive proof of each of these elements of contract. For example: The specifications furnished in connection with the advertisement for bids contain a complete description of each of the several sizes and quality of envelopes, the materials to be used, conditions for their manufacture, delivery, terms of payment, etc. These papers, prepared in full by the Department, contain every stipulation, provision and condition of the contract. The bidder was even required to make his proposal on the blank form provided by the Department. Nothing was left for the bidder but to insert in this blank form the price per thousand at which he proposed to furnish the envelopes, sign and return the proposal to the Department.

See proposals and specifications (R. 8–19).

The acceptance of the proposal was equally distinct. On April 20, 1898, Order No. 149 was issued by the Postmaster General awarding the contract to the Purcell Envelope Company as the lowest bidder (R. 49).

The foregoing furnishes conclusive evidence that the minds of the parties had met and agreed upon certain specific and distinct obligations which were to be observed by both. The existence of a contract cannot be denied.

If it were necessary, or even possible, to add to the certainty of this matter, it might be done by reference to the preparation and delivery by the Department of the formal contract in the precise terms of the proposal, with the request that claimant execute and return it and claimant's compliance with that request (Finding VI, R. 50, and Finding VIII, R. 51).

Furthermore, the parties actually entered on the performance of the contract, the Department by written instructions to claimant (Finding VII, R. 50–51), and the claimant by arranging for drawings and paper (Finding IX, R. 51–52).

POINT II.

The Breach of the Contract.

Facts. The contract was awarded April 20, 1898, performance to begin on the first day of October, 1898 (Finding IV, R. 49). On April 27, 1898, five days after claimant and its Surety had signed and returned the formal contract to the Post Office Department the Postmaster General wrote a letter directing the claimant to suspend action pending further orders (Finding IX, R. 52). On July 22, 1898, the Postmaster General made Order No. 301, declaring the contract null and void (Finding XIV, R. 53). Thereafter, on July 26, 1898, the Postmaster General made an emergency contract for the envelopes with the Plimpton Manufacturing Company (Finding XVI, R. 54, 55, 56). On October 25, 1898, the Postmaster General made a contract for the four-year term with the Plimpton Manufacturing Company (Finding XVII, R. 56, 57, 58). The Department never called on the claimant to furnish any envelopes, although it stood ready and willing at all times to furnish them (Finding XII, R. 53).

The foregoing facts are not in dispute. Do they constitute a breach?

"Where one party to an executory contract prevents the performance of it, or puts it out of his power to perform it, the other party may regard it as terminated, and demand whatever damages he has sustained thereby."

Lowell v. *St. Louis Mut. Life Ins. Co.*, 111 U. S. 264, 276.

The foregoing principle of law is clearly stated by Mr. Chief Justice Fuller in *Rochm* v. *Horst*, 178 U. S. 1, at pages 7 and 8.

See also *Howard* v. *Daly*, 61 N. Y. 362, and *Garfielde* v. *United States*, 93 U. S. 242.

The Postmaster General Had No Power to Annul the Contract.

The order of the Postmaster General on July 22, 1898, declaring the contract null and void, cannot be justified at law.

The Garfielde case settles that principle, but it has been laid down by additional authorities on many occasions.

In *Cooke* v. *United States*, 91 U. S. 398, the Court says:—

"If it (the United States) comes down from its position of sovereignty and enters the domain of commerce, it submits itself to the laws that govern individuals there."

See also 30 Ct. Cls., R. 352, 361.
15 Peters, 377, 392.
74 Fed. Rep. 145, 151.

The Postmaster General had no more authority to annul this contract than one individual has to revoke his contract with another. No man can revoke his contract except on terms contained in the contract itself or by mutual con-

sent. In this case there was no revocation by consent and the contract itself contained no provision that it might be annulled in the manner attempted by the Postmaster General.

POINT III.

The Measure of Damages.

"The measure of damages is the difference between the contract price and the cost of performance" (*Roehm* v. *Horst,* 178 U. S. 1, at p. 28).

See also *Sneed* v. *United States,* 8 Wall. 77.
Masterson v. *Brooklyn,* 7 Hill, 62.
Phila. W. & B. Co. v. *Howard,* 54 U. S. 305, 344.
United States v. *Behan,* 110 U. S. 338.
Hinckley v. *Pittsburg Steel Co.,* 121 U. S. 264.

Time of Action. *"The law is settled that an action for breach of contract will lie at once, upon the positive refusal of performance, although the time specified for performance has not arrived."* *Donovan* v. *Sheridan,* 53 N. Y. St. Rep. 587.

In *Rochm* v. *Horst,* 178 U. S. 1, the law on this point is set forth at length and with great clearness by Mr. Chief Justice Fuller.

The facts on this point are clear. The renunciation was absolute and unequivocal (Finding XIV, R. 53).

Reasonable Deduction. In some cases of this character it has been held that a reasonable deduction should be made from the estimated profits of the claimant because of the release from the care, trouble, risk, and responsibility of performance. What that deduction should be is largely a matter of discretion for the Court. There is

no precedent in point. In this particular case the Court of Claims has made no specific deduction on this account, though the point has been strongly urged by counsel for the United States at both trials.

Doubtless the Court has made allowance for this feature of the case in its calculation of the damages or it has concluded that the years of litigation, with their incalculable labor, expense, anxiety, and care to which the claimant has been forced, more than offset the trouble which would have attended performance of the contract.

It seems pertinent to state here that the claimant or Appellee, by its bid in 1898, and the upset of the little ring of collusive bidders, who had hitherto controlled the Government envelope business, was the direct cause of a saving to the Government during the four-year period, 1898 to 1902, of $1,400,000 (Finding XVII, R. 58). If the saving since has been at the same rate it now amounts to $5,600,000 additional.

Notwithstanding this, we have been forced through nearly seventeen years of litigation involving a suit in equity to prevent the breach of the contract, two complete trials in the Court of Claims, with innumerable intermediate motions, and hearings and finally an appeal to the Supreme Court. When the foregoing is considered and the further fact that simple interest, for the period of litigation, on the $185,000 awarded at both trials by the Court of Claims, would be $177,600, it seems reasonable to expect that a court will make no deduction from proven damages by reason of any release from the care of performance.

Amount of Damages. The Court of Claims has, on two occasions after two complete trials and the most exhaustive presentation of testimony, and argument, awarded the Appellee the sum of $185,331.76, and judgment has been entered accordingly (R. 43 and R. 66).

APPELLANT'S BRIEF.

A copy of the Appellant's brief has been furnished counsel for Appellee two days before it is necessary for counsel to take the train for Washington. One of the two intervening days is Sunday. It will therefore be impossible to make any extended reply and have the same in printed form in season for the argument. The copy furnished to counsel is in typewritten form and it will therefore be impossible to make any reference to the printed pages.

The Contract.

The Appellant's contention that there was no contract between the Purcell Company and the United States requires little consideration. The main points are:—

1. That the Postmaster General failed to sign the written contract;
2. That he failed to approve the surety;
3. That his attempted annulment was valid.

The Garfielde case settles the first point beyond all question. The formal award of the Post Office Department, in response to the Purcell Company's bid, created a contract if there had been nothing more. In addition to this, however, we have the documentary evidence already referred to in this brief (page 3) which establishes clearly that the minds of the contracting parties met on a distinct proposition in all its details. The advertisement, the specifications, the contract prepared by the Post Office Department, and sent to the Purcell Company, with instructions to execute it, contain the most minute provisions for every possibility which might arise in the performance of the contract. Nothing was left to the option of the Purcell Company. The Post Office said in effect:—"We have awarded you a contract.

We are sending you the written document. Sign it and return to us."

The second point is well answered in the opinion of the Court of Claims. The Surety Company which signed the contract as surety in the sum of $200,000 was of unquestioned financial responsibility. The Postmaster General knew it at that time, as counsel for the Government knows it now. To have repudiated the contract on that ground would have subjected the Postmaster General to instant criticism and such a course could not have been defended. Of course he was satisfied with the responsibility of such a company as any other individual or official would have to be. Furthermore, if he were dissatisfied, his remedy, as provided in the specifications (R. 18) and in the Contract (R. 28), was to give the contractor ten days' notice to provide new or additional sureties. He had no right, by the terms of the contract, by the rules of law, or ordinary decency, to annul the contract for insufficient surety without giving the contractor opportunity to furnish additional surety. The fact that the Postmaster General never mentioned the sufficiency of the surety in any manner or at any time is sufficient ground to assume that the question never entered his mind, and it certainly gives the Purcell Company the right to assume that his silence signified his satisfaction.

The third point has received considerable space in the Appellant's brief. Great emphasis is laid on the fact that Postmaster General Smith, who broke the contract, had unfavorable reports on the contractor's financial responsibility. That fact would be less surprising if counsel stated, what is a fact, that the unfavorable reports came exclusively from disappointed competitors at the first bidding. It is certainly of equal importance that the predecessor of Postmaster General Smith, who awarded the contract to the Purcell Company, also instituted an investigation of its responsibility and received a favorable report thereon. It was proper that the Postmaster General, prior to the

award, should investigate the bidders. He had a right, as provided in the Specifications (R. 18), to reject any and all bids; but having made his investigations and ordered the award, he obligated his principal, the United States, and neither he nor his successor could ever evade that obligation except by the mutual assent of both parties to the contract or in accordance with the terms of the contract itself. That being so, it makes no difference whether Postmaster General Smith acted in good faith or bad. It makes no difference that his report was favorable or unfavorable. The contract was made. The only opportunity the Government had to break it was when the Purcell Company failed in its performance.

Damages.

Alleged Necessity of Additional Findings.

The record on appeal contains a list of requests for additional findings of fact, pages 67 to 76, which were denied by the Court of Claims on December 18, 1916. These same requests were made the basis of a recent motion to the Supreme Court, which was also denied, asking again that the case be remanded to the Court of Claims. Counsel for the United States now returns to this point of attack in his brief.

Authorities. *"By our (the Supreme Court) rules in reference to appeals from the Court of Claims, rule 1, sect. 2, that Court sends here its finding of facts as 'established by the evidence, in the nature of a special verdict.' The evidence is not sent up. This finding is conclusive unless impeached for some error in law appearing in the record."*

United States v. *Smith*, 94 U. S. 214, at page 218.

The opinion in the Smith case just cited is continued on page 219, as follows:—

"All these were legitimate subjects of inquiry by the Court in making up its final estimate; but we know of no rule of law or practice which requires a court or jury to specify the elements of the calculation by which it arrives at its final result."

"The result of the best judgment of the triers is all that the parties have any right to expect." *U. S.* v. *Smith,* 94 U. S. 219. See also *McClure* v. *United States,* 116 U. S. 145. *U. P. Ry. Co.* v. *United States,* 116 U. S. 154.

Application. The foregoing principles are readily applied to the present case. The facts have been found by the Court of Claims, after consideration of all the testimony and exhaustive written and oral arguments at two different trials. These additional requests contain nothing which has not been discussed over and over again. The subject matter, so far as material, has been considered and findings made thereon. The Court of Claims therefore, very properly, refused any further attention to the same old questions, even though put in a new form and with a new set of Roman designations.

Analysis of Requests. The particular findings here requested relate to mere incidental facts which amount only to evidence. The most casual reading of the requests substantiates the foregoing statement. For example, the following brief quotations are made:—

Request I, R. 67. *"Whether or not . . . Purcell made a statement with regard to the financial condition of the stockholders of the Purcell Co.?"*

Request IV, R. 68. *"Whether or not . . . information was transmitted to the Postmaster General . . .*

that a mortgage on the Purcell plant was held by L. J. Powers?"

Request VII, R. 70. *"Whether or not in a letter of Senator Platt it was stated, 'I hope you will not sign the contract,' etc.?"*

Some of the requests are so totally immaterial that they are absurd. For example,—

Request XV, R. 72. *"Whether or not the Norman Paper Co. combined with the American Writing Paper Co. in 1899 and 1900?"*

Other requests amount to nothing more than an attempt to cross-examine the Court on the reasoning by which it reached its conclusions. For example:—

Request XXIII, R. 74. *"Whether or not any correspondence or contract was ever entered into between Purcell Co. and Wickham?"*

"Whether or not the price was agreed upon?"

"Whether or not the promise mentioned in Finding XI was to be performed within one year from the making thereof, etc.?"

"Whether or not the Court included in the cost incident to the execution of the contract anything on account of the purchase of Wickham machines?"

Request XXV, R. 75. *"Whether or not the sum of all the various issues, etc., which was to be the basis in round numbers for which the contract was awarded, was 600,658,000 and if not, what number did furnish the basis of the contract?"*

Request XXVIII, R. 76. *"Whether or not the Court has included in Finding XX . . . the cost of gum, ink, dies, matrices, etc., and if so, the amount of said items respectively?"*

The particular requests above quoted are typical of all the others. As a whole they seek nothing but to review the evidence and cross-examine the Court. They are immaterial, irrelevant, and impertinent.

The Court of Claims has considered all the evidence and all the requests. It has made findings in accordance with its best judgment. In the language of the Court in *United States* v. *Smith*, 94 U. S. 219, "*The result of the best judgment of the triers is all that the parties have any right to expect.*"

The foregoing is sufficient general answer to the claim that additional findings are proper and necessary. It is perhaps well to refer in particular to those points on which the appellant lays greatest stress.

1. The point is raised in Requested Finding XXV, R. 75, and argued in Appellant's brief, that the Court of Claims erred in estimating damages on the basis of the number of issues actually called for by the Post Office Department during the four years for which this contract was to run, instead of using the figure set forth in the Department's advertisement as the basis upon which bids would be computed. The answer to this contention is obvious. Bids were solicited for fourteen different kinds of envelopes. Bidders might vary greatly in their estimates as to the price which should be made for any one or all of the fourteen different kinds. The only way in which the Government could determine the lowest bidder was to use a specific figure in the computation, and with this basic figure compute, with the aid of the bidder's detailed prices, the total amount of his bid. The natural figure on which to base the estimate was the total number of issues called for in the previous four-year term. That happened to be, in round numbers, 600,000,000, and that figure was used. Except for the purpose of calculating the relative size of the original bids this figure had no significance. The speci-

fications distinctly provided that *"any proposal made under the advertisement and the specifications, shall impose the obligation to furnish, at the prices bid, all the envelopes and wrappers that may be ordered by the Department during the contract term without regard to the quantities above given"* (R. 17). Here was a clear obligation upon the bidder to furnish all the envelopes that the Government might ask for during the term of the contract. It is equally clear that the Government was obliged to give this contractor the opportunity to make all the envelopes it needed, provided, of course, its performance was up to requirements. Therefore, the Court of Claims very properly determined the total number of envelopes called for during the term of contract and estimated the total price which the contractor would have received on this basis (R. 58).

A portion of the envelopes furnished during the term of this contract was furnished under a so-called emergency contract with the Plimpton Manufacturing Company. The Court could very properly consider, in figuring claimant's profits, these envelopes furnished under the so-called emergency contract, as well as envelopes furnished under the later contract for the balance of the term, for the reason that all of the envelopes under either the emergency or the regular contract were required by the Government during the term '98–'02, for which the Purcell Company had the right to manufacture the Government requirements.

2. Appellant asks that the Court of Claims make a finding as to the cost of the Wickham machines, and then deduct that amount from claimant's damages. This specific finding is unnecessary, and any such deduction would be grossly improper. If the claimant had purchased Wickham machines for the performance of the contract, the purchase price would obviously have been a capital investment, and could not, by any system

of reasoning, be charged as a whole against the performance of this four-year contract. It would be just as fair to charge against the performance of this contract the cost of claimant's $200,000 brick building. The most that could be considered in this respect is a fair overhead or carrying charge, incident to the purchase or rental of these machines. That the Court has undoubtedly done. Finding XX, R. 59, sets forth in a single item the sum total of the cost of performance; but in estimating that sum every conceivable item of expense was figured. This statement may be verified by reference to the testimony and to the findings of the Court of Claims at the first trial. That amount must stand as the final conclusion of the Trial Court and is not subject to review.

3. The question of deduction on account of contractor's release from responsibility of performance is already treated in this brief on pages 9 and 10.

SUMMARY.

The Appellee had an express and valid contract with the United States. That contract was unlawfully broken by the United States. The Appellee has proved damages to the amount of $185,331.76, and judgment therefor has been entered by the Court of Claims in favor of the Appellee.

It is respectfully submitted that this judgment should be affirmed.

ARTHUR BLACK,
Attorney for the Appellee.

STANTON C. PEELLE,
C. F. R. OGILBY,
Of Counsel.

No. 168

IN THE

Supreme Court of the United States

OCTOBER TERM, 1918

THE UNITED STATES, APPELLANT

v.

THE PURCELL ENVELOPE COMPANY
APPELLEE

APPEAL FROM THE COURT OF CLAIMS

APPELLEE'S ANSWER TO SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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APPEAL FROM THE COURT OF CLAIMS.

APPELLEE'S ANSWER TO SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

A new counsel for the United States has filed a "Supplemental Brief" in which he devotes sixteen pages to argument in support of the claim that the Post Office Department, if it made any contract at all with the Purcell Company, was never obligated to take more than fifteen days' supply of envelopes and that as a consequence the Purcell Company is now limited in recovery to its expense in preparing for the contract plus its profit, if any, on fifteen days' supply of envelopes.

This contention is original but it has no other merit. It cannot be supported by any reasonable or fair interpretation of the advertisement, the bid, the award, the written

contract or the correspondence relating thereto. On the contrary the language of John A. Merritt, Third Assistant Postmaster General, in his letters of April 20th and April 21st shown in Findings V and VI, R. 50, indicate clearly the point of view of the Post Office Department. In each letter he refers to "*the contract for furnishing this Department with stamped envelopes during the four years beginning on the first of October next.*"

It is enough to say that in the seventeen years of litigation over this claim this contention has never before been raised by any member of the Post Office Department which prepared the advertisement, award, and contract, nor by any one of the numerous and vigilant counsel heretofore employed by the United States in its defence.

The Post Office Department asked for bids on a four-year contract. The successful bidder was to be given the exclusive right to furnish all the government requirements for the four year period, so long as he complied with the terms of the contract. Common sense forbids any other view. If a new bidder could never make the government take more than fifteen days' supply no new bids could be obtained and the government would be absolutely at the mercy of the old contractor. The government of course is the only user of stamped envelopes. To manufacture them requires special facilities, machinery and other conditions, as is clearly shown by the detailed requirements in the contract R. 21–29. The paper from which the envelopes are made is of a special formula and could not be economically purchased except in large quantities and for a definite period. The volume required by the government is tremendous. No one would equip himself with the factory, machinery and materials to meet the government demands without a definite contract for a long term. Such a contract was made with the Purcell Company. The interpre-

tation placed upon it by the latest counsel for the United States is indefensible.

Respectfully submitted,

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